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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1929~~ 1930

No. ~~583~~ 33

HAROLD J. COOLIDGE AND AUGUSTUS P. LORING, TRUSTEES, APPELLANTS,

vs.

HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS

APPEAL FROM THE PROBATE COURT OF NORFOLK COUNTY, STATE OF MASSACHUSETTS

FILED JANUARY 18, 1930

(34,714)

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SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 27, 1930

[fol. a]

IN PROBATE COURT OF NORFOLK COUNTY

HAROLD J. COOLIDGE and AUGUSTUS P. LORING, Trustees, Appellants,

v.

HENRY F. LONG, Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby agreed that the portions of the record hereinafter specified and no others be included in the transcript to be transmitted to the Supreme Court of the United States in connection with the appeal of Harold J. Coolidge and Augustus P. Loring, trustees, from the decree entered by the Probate Court for the County of Norfolk in the Commonwealth of Massachusetts on December 23, 1929, dismissing the petition brought by them against Henry F. Long, Commissioner of Corporations and Taxation of said Commonwealth, for the abatement of an inheritance tax assessed upon the estate of Julia Coolidge:

1. Petition (filed November 8, 1927).
2. Motion to amend petition (allowed December 21, 1927).
3. Answer.
4. Stipulation (including copy of declaration of trust and copy of assignment).
5. Reservation and report.
6. Supplement to reservation.
7. Rescript.
8. Opinion of Supreme Judicial Court.
9. Final decree after rescript (entered December 23, 1929).

[fol. b] 10. Petition for appeal, assignment of errors and prayer for reversal.

11. Order allowing appeal.
12. Bond on appeal.

13. Citation (with acceptance of service).
Storey, Thorndike, Palmer & Dodge, Solicitors for Appellants. Joseph E. Warner, Attorney General, by James S. Eastham, Ass't Atty. General.

NORFOLK COUNTY:

A true copy. Attest: James F. Reynolds, Assistant Register. (Seal.)

[fol. 1] IN PROBATE COURT OF NORFOLK COUNTY

PETITION—Filed Nov. 8, 1927

To the Honorable the Judge of the Probate Court in and for the County of Norfolk:

Respectfully represent Harold J. Coolidge of Boston, Suffolk County, Massachusetts, and Augustus P. Loring, of Beverly, Essex County, Massachusetts, petitioners, that they bring this petition against the Commissioner of Corporations and Taxation, respondent, and allege him to be the only party interested in the matter of said petition, and further represent that they are the Trustees under a certain deed and declaration of trust, dated July 29, 1907, for the benefit of J. Randolph Coolidge et alii; that on November 10, 1926, they paid under protest taxes in the amount of $25,201.82 assessed by the Commissioner of Corporations and Taxation on account of property passing under the said deed and declaration of trust; that as such Trustees they are aggrieved by the determination of the tax liability and assessment as aforesaid.

Wherefore your petitioners respectfully pray for the abatement of said taxes, or so much thereof as your Honorable Court may determine to have been assessed without authority at law.

[fol. 2] Dated this seventh day of November, 1927.

Harold J. Coolidge, Augustus P. Loring.

The undersigned, being all the persons interested in the subject-matter of the above petition, hereby accept service of the same.

——— ———.

NORFOLK COUNTY:

A true copy. Attest: James F. Reynolds, Assistant Register. (Seal.)

[fol. 2½] [File endorsement omitted.]

[fol. 3] IN PROBATE COURT OF NORFOLK COUNTY

(Estate of Julia Coolidge)

HAROLD J. COOLIDGE et al., Trustees,

v.

COMMISSIONER OF CORPORATIONS AND TAXATION

MOTION TO AMEND PETITION AND ORDER ALLOWING SAME

Now come the above named petitioners and move to amend the petition so that it will read in accordance with the copy hereto annexed.

Harold J. Coolidge, Augustus P. Loring, Trustees.
Dec. 21, 1927.

Motion to amend allowed.

Joseph R. McCoole, Judge Probate Court.

[fol. 4] IN PROBATE COURT OF NORFOLK COUNTY

AMENDED PETITION—Filed Dec. 14, 1927

To the Honorable the Judge of the Probate Court in and for the County of Norfolk:

Respectfully represents Harold J. Coolidge, of Boston, Suffolk County, Massachusetts, and Augustus P. Loring, of Beverly, Essex County, Massachusetts, trustees, petitioners, that they bring this petition against the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts, respondent, and allege him to be the only party interested in the matter of said petition, and further

represent that they are the trustees under a certain deed and declaration of trust dated July 29, 1907, executed by J. Randolph Coolidge and Julia Coolidge for the benefit of J. Randolph Coolidge, Jr. and others; that Julia Coolidge has died leaving an estate within the jurisdiction of the Probate Court for the County of Norfolk; that the respondent has assessed an inheritance tax upon the estate of said Julia Coolidge and as a part thereof has assessed a tax in the amount of $20,082.01 upon the interests passing under said deed and declaration of trust; that your petitioners on November 10, 1926 paid under protest the said amount of $20,082.01; that they are aggrieved by the determination of said tax and its assessment as aforesaid.

Wherefore your petitioners respectfully pray that said tax be abated in full and that the respondent may be ordered to repay them the amount thereof with interest and costs.

[fol. 5] Dated this 7th day of November, 1927.

Harold J. Coolidge, Augustus P. Loring, Trustees.

The undersigned, being all the persons interested in the subject matter of the above petition, hereby accept service of the same.

——, ——.

Norfolk County:

A true copy. Attest: James F. Reynolds, Assistant Register. (Seal.)

[fol. 5½] [File endorsement omitted.]

[fol. 6] In Probate Court of Norfolk County

[Title omitted]

Answer—Feb. 3, 1928

Now comes Henry F. Long, as he is Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts, and for answer to the petition herein filed says as follows:

1. He admits that the petitioners are trustees under a certain deed and declaration of trust, dated July 29, 1907,

for the benefit of J. Randolph Coolidge et alii; that on November 10, 1926, they paid under protest taxes in the amount of $20,082.01 assessed by him as said Commissioner on account of property passing under the said deed and declaration of trust; but denies each and every other allegation of fact or conclusion of law contained in the said petition.

2. In particular the Commissioner denies that the petitioners as such trustees were aggrieved by the determination of the tax liability and assessment as aforesaid, but says that the said tax was properly determined and assessed by him as Commissioner.

Wherefore he prays that the petition be dismissed, with costs to be paid by the petitioners.

Henry F. Long, Commissioner of Corporations and Taxation, by Arthur K. Reading, Attorney General, by James S. Eastham, Assistant Attorney General.

Norfolk County:

A true copy. Attest: James F. Reynolds, Assistant Register. (Seal.)

[fol. 7] In Probate Court of Norfolk County

[Title omitted]

Stipulation as to Facts—May 28, 1928

In the above-entitled cause and for the purposes thereof, and for none other, it is hereby stipulated and agreed as follows:

1. Julia Coolidge, the wife of J. Randolph Coolidge, died January 6, 1921, a resident of Brookline, Massachusetts.

2. On July 29, 1907, Julia Coolidge joined with her husband, J. Randolph Coolidge, in transferring certain real and personal property to trustees, and the trustees executed a declaration of trust, a copy of which is hereto annexed.

3. The said transfer was voluntary and was not a bona fide purchase for full consideration in money or money's worth.

4. Three sevenths of the property conveyed to the trustees as aforesaid was furnished by Julia Coolidge and four-sevenths by her husband.

5. On April 6, 1917, Julia Coolidge and her husband, J. Randolph Coolidge, executed an assignment of all their interest in the trust funds and all their right to receive the income therefrom to their sons J. Randolph Coolidge, Jr., John G. Coolidge, Archibald C. Coolidge, Harold J. Coolidge and Julian L. Coolidge. A copy of this assignment [fol. 8] is hereto annexed.

6. The said five sons were all living at the death of J. Randolph Coolidge who survived his wife Julia Coolidge and died November 10, 1925.

7. As of the said date of the death of J. Randolph Coolidge the value of three-sevenths of the property then held by the petitioners as the present trustees under the aforesaid declaration of trust was $502,050.31. As a result of changes of investments the said property was not the same as that originally in the trust.

8. The Commissioner of Corporations and Taxation determined that the petitioners were subject to an inheritance tax under G. L. c. 65, s. 1 as amended upon the aforesaid three-sevenths of the net trust property as of November 10, 1925 and accordingly assessed a tax of $20,082.01 which the petitioners paid under protest on November 10, 1926.

9. If the trust property is subject to an inheritance tax the amount was correctly figured by the Commissioner.

Harold J. Coolidge, Augustus P. Loring, Trustees, by Robert G. Dodge, Att'y. Henry F. Long, Commissioner of Corporations and Taxation, by James S. Eastham, Assistant Attorney General.

[fol. 9] EXHIBIT TO STIPULATION

Declaration of Trust

Whereas J. Randolph Coolidge of Brookline, in the county of Norfolk and Commonwealth of Massachusetts, has by

his deed of even date herewith conveyed certain real estate situated in Boston, county of Suffolk and Commonwealth aforesaid, to wit: A parcel of land, with the buildings thereon numbered 19 to 25 High Street, 175 to 179 Federal Street, and 150 to 152 Summer Street in said Boston, to Augustus P. Loring of Beverly, county of Essex and Commonwealth aforesaid to the use of the said J. Randolph Coolidge, and of the said Augustus P. Loring and of Harold J. Coolidge of said Boston, and the survivor of them, in trust upon certain trusts; and

Whereas Julia Coolidge of said Brookline, wife of the said J. Randolph Coolidge, has by her deed of even date herewith conveyed certain real estate situated in said Boston, to wit: Two several parcels of land, with the buildings thereon, one of them being numbered 62 to 64 Sumner Street, and the second numbered 26 to 30 on Federal Street and 127 on Congress Street, in said Boston, to the said Augustus P. Loring to the use of the said J. Randolph Coolidge, Augustus P. Loring and Harold J. Coolidge, and the survivor of them, in trust upon the same trusts; and

Whereas the said J. Randolph Coolidge and the said Julia Coolidge have each of them by an instrument executed on the twenty-ninth day of July, 1907, assigned and transferred certain personal property as described in the schedule annexed to said instruments, to the aforesaid J. Randolph Coolidge, Augustus P. Loring, and Harold J. Coolidge, to hold as trustees upon the same trusts; and

Whereas the said J. Randolph Coolidge and Julia Coolidge may prior to the first of September, 1907, convey or [fol. 10] transfer other real estate or personal property to the said trustees to be held upon the same trusts; therefore, be it known, that we, the above-mentioned J. Randolph Coolidge, Augustus P. Loring, and Harold G. Coolidge, do hereby declare that we do hold upon the following trusts, the said real estate and personal property herein referred to, and such other property as may be conveyed or assigned to us prior to September 1, 1907, to hold upon the terms of this trust, together with all accumlations and accretions of the trust fund hereby created, and all property substituted for the original fund under the powers herein given:

1st. In trust to pay the net income of the trust fund to the said J. Randolph Coolidge and the said Julia Coolidge four sevenths (4/7) and three sevenths (3/7) respectively to each so long as they both live, and to pay the whole of said net income to the survivor and upon the death of the survivor to distribute equally the trust property among the following persons who are children of the said J. Randolph Coolidge and Julia Coolidge, viz: J. Randolph Coolidge, jr., John Gardner Coolidge, Archibald Cary Coolidge, Harold J. Coolidge, and Julian L. Coolidge; and should any of said persons predecease the survivor of the said J. Randolph Coolidge and Julia Coolidge, to pay the share of the person so predeceasing to those who would be entitled to take his intestate property under the statute of distributions in effect at the time of the death of such survivor, provided that in no case shall a surviving widow take as distributee, more than one-half of said share.

2nd. The trustees shall have full power to make, vary, and change investments, and may invest in such real estate, personal property, stocks, bonds and other securities [fol. 11] or property as in their opinion are proper investments for this trust fund.

3rd. They may sell any or all the trust property original accruing or substituted, at such times, in such manner, and for such considerations as they think fit, and may convey the same in fee or for any less estate, and no purchaser shall be required to see to the application of the purchase money paid by him to the trustees or either of them.

4th. They may, in their uncontrolled discretion let or lease the real estate on short or long leases, or on building leases, part of the consideration for which is the improvement of the premises; and no lessee shall be liable for the application of any payment of money made to the trustees or any of them.

5th. They may improve, alter, or rebuild the trust buildings, or build new buildings on the trust lands or on land acquired for that purpose, and may make contracts binding the trust property for the purpose of carrying out any of their powers; but they shall not bind the beneficiaries of the trust, nor need they bind themselves personally.

6th. They may determine what receipts and payments shall be charged or credited to income or principal, and their determination made in good faith shall be final.

7th. They may employ such brokers, engineers, clerks, collectors, agents, or attorneys as they see fit, and shall not be liable for their misbehavior.

8th. They shall account to the beneficiaries once a year, and shall be entitled to receive as compensation for their services five per cent upon the gross amount of the income, and such compensation for extra services as a majority of those beneficiaries who are sui juris shall approve.

[fol. 12] 9th. All the powers given to the trustees named shall pass to the survivors or survivor and to successors or successor in the trust. At any time when there are three or more trustees in office, any of the trustees may delegate all his powers and authority to the other trustees by any instrument under seal duly recorded, which shall remain in force until revoked by an instrument similarly executed and recorded, provided that such delegated power shall not be exercised by less than two trustees.

10th. Any vacancies in the number of the trustees may be filled or an additional trustee or trustees may be appointed by the trustees or trustee in office with the assent of the majority of the beneficiaries who are sui juris. If there are no trustees in office, then a trustee or trustees may be appointed by not less than three-fourths of the beneficiaries who are sui juris; and all appointments made under the powers given trustees or beneficiaries by this clause shall be made by an instrument in writing signed and sealed by the parties making the appointment and acknowledged by at least one of them. If no appointment is so made within thirty days from the date when there has ceased to be a trustee in office, any party in interest may apply to the probate court for Suffolk County to appoint a new trustee or trustees.

11th. No trustee hereunder shall be required to give a bond for the faithful performance of his duties, nor shall any trustee be liable for the acts or defaults of another trustee; but each trustee shall be liable for his own willful acts or defaults only.

In witness whereof we have hereunto set our hands and seals this twenty-ninth day of July 1907.

J. Randolph Coolidge, Augustus P. Loring, Harold J. Coolidge (and each a seal).

[fol. 13] We, the undersigned J. Randolph Coolidge and Julia Coolidge assent to the above declaration of trust.

J. Randolph Coolidge, Julia Coolidge.

Commonwealth of Massachusetts,
Suffolk, ss:

Boston, July 29, 1907.

Then personally appeared the above named J. Randolph Coolidge, Augustus P. Loring, and Harold J. Coolidge and acknowledged the foregoing instrument to be their free act and deed before me.

Harold D. Apollonio, Justice of the Peace.

A true copy of an instrument left for record with Suffolk deeds July 29, 1907, at four o'clock and twenty-seven minutes P. M.

Attest:

(Signed) Wm. T. A. Fitzgerald, Register.

[fol. 14] Exhibit to Stipulation

Assignment

Whereas J. Randolph Coolidge and Julia Coolidge, his wife, both of Brookline, Norfolk County, Massachusetts, did by certain instruments dated July 29, 1907, convey certain real estate and personal property belonging severally to them to J. Randolph Coolidge, Augustus P. Loring, and Harold J. Coolidge in trust for certain purposes, and

Whereas a certain declaration of trust signed by the said J. Randolph Coolidge, Augustus P. Loring, and Harold J. Coolidge as trustees, and assented to by the said J. Randolph Coolidge and Julia Coolidge, dated on said July 29th, 1907, and recorded in Suffolk Deeds Book 3227, page 260, sets forth the purposes of said trust to be as follows:

To pay the income from the trust fund in certain proportions to the said J. Randolph Coolidge and Julia Cool-

idge so long as they both live, and to pay the whole of said net income to the survivor; and upon the death of the survivor to distribute equally the trust property among the following named persons who are children of the said J. Randolph Coolidge and Julia Coolidge, viz: J. Randolph Coolidge, junior, John G. Coolidge, Archibald C. Coolidge, Harold J. Coolidge, and Julian L. Coolidge, and

Whereas the said J. Randolph Coolidge and Julia Coolidge now desire to transfer and assign all their title and interest in and to the income of said trust fund in equal shares to their said five children who are now all living.

Now then, we the said J. Randolph Coolidge and Julia Coolidge in consideration of one dollar and other good and [fol. 15] valuable consideration to us paid by the said J. Randolph Coolidge, jr., John G. Coolidge, Archibald C. Coolidge, Harold J. Coolidge, and Julian L. Coolidge, the receipt whereof is hereby acknowledged, do hereby transfer, convey, and assign to the said J. Randolph Coolidge, jr., John G. Coolidge, Archibald C. Coolidge, Harold J. Coolidge, and Julian L. Coolidge, in equal shares, all our interest in said trust fund, and all our right to receive the income therefrom, including additions thereto and any accrued income which has not already been paid over to us.

To have and to hold the same to the said J. Randolph Coolidge, jr., John G. Coolidge, Archibald C. Coolidge, Harold J. Coolidge, and Julian L. Coolidge, their executors, administrators, and assigns forever.

And we hereby request and direct Harold J. Coolidge and Augustus P. Loring, the present trustees of said fund, henceforth to pay over the income to our said five children in accordance with this assignment.

In witness whereof we hereunto set our hands and seals this sixth day of April, 1917.

(Signed) J. Randolph Coolidge (Seal), Julia Coolidge.

Commonwealth of Massachusetts,
Suffolk, ss:

Boston, April 6, 1917.

Then personally appeared the above named J. Randolph Coolidge and Julia Coolidge, and acknowledged the fore-

going instrument by them signed to be their free act and deed.

Before me,

(Signed) Howard S. Patterson, Justice of the Peace.

[fol. 16] We, the undersigned, being the present trustees of the above-mentioned trust fund, hereby acknowledge the receipt of notice of the above assignment.

(Signed) Harold J. Coolidge, Aug. P. Loring.

NORFOLK COUNTY:

A true copy. Attest: James F. Reynolds, Assistant Register.

[fol. 17] IN PROBATE COURT OF NORFOLK COUNTY

[Title omitted]

RESERVATION AND REPORT—Sept. 12, 1928

These petitions for abatement of the Massachusetts Inheritance Tax, filed by Harold J. Coolidge and Augustus P. Loring trustees under a certain deed and declaration of trust dated July 29, 1907, for the benefit of J. Randolph Coolidge et alii, came before me for final determination, and being in doubt as to the decrees which should be entered I now reserve and report upon the pleadings and stipulations all questions of law for the consideration of the Supreme Judicial Court, in accordance with General Laws, Chapter 215, Section 13 to determine what decrees should be entered.

September 12, 1928.

Joseph R. McCoole, Judge of Probate Court.

NORFOLK COUNTY:

A true copy. Attest: James F. Reynolds, Assistant Register.

[fol. 18] In Probate Court of Norfolk County

[Title omitted]

Supplement to Reservation—Nov. 7, 1928

The following rulings (which were requested by the petitioners at the hearing upon the above-entitled petition) may be referred to as a part of the reservation and report of said petition heretofore filed:

1. G. L. c. 65, s. 1, does not, according to its true construction, purport to authorize the imposition of the tax now in question.

2. If G. L. c. 65, s. 1, purports to authorize the imposition of the tax now in question, it is repugnant to Article XII of the Bill of Rights.

3. If G. L. c. 65, s. 1, purports to authorize the imposition of the tax now in question, it is in excess of the power granted to the General Court by Article IV of Section I of Chapter I of the Constitution of Massachusetts.

4. If G. L. c. 65, s. 1, purports to authorize the imposi- of the tax now in question, it is repugnant to Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of the contract embodied in the trust indenture of July 29, 1907.

[fol. 19] 5. If G. L. c. 65, s. 1, purports to authorize the imposition of the tax now in question, it is repugnant to Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of the contract embodied in the assignment of April 6, 1917.

6. If G. L. c. 65, s. 1, purports to authorize the imposition of the tax now in question, it deprives the petitioners and those claiming under them of their property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

7. If G. L. c. 65, s. 1, purports to authorize the imposition of the tax now in question, it denies to the petitioners and those claiming under them the equal protection of the

laws contrary to the Fourteenth Amendment to the Constitution of the United States.

Joseph R. McCoole, Judge of Probate Court.

NORFOLK COUNTY:

A true copy. Attest: James F. Reynolds, Assistant Registrar.

[fol. 20] IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

RESCRIPT—Sept. 11, 1929

In the Case of

HAROLD J. COOLIDGE et al., Trustees,

vs.

COMMISSIONER OF CORPORATIONS & TAXATION

Pending in the Probate Court for the County of Norfolk

Ordered that the register of probate and insolvency in said county make the following entry under said case in the docket of said court, viz., Decree to be entered denying the petition for abatement.

By the Court.

Walter F. Frederick, Clerk.

September 11, 1929.

[fol. 21] Brief Statement of the Grounds and Reasons of the Decision

The reasons of the decision are set forth in length in the opinion, filed with the reporter of decisions, to which reference is made.

NORFOLK COUNTY:

A true copy. Attest: James F. Reynolds, Assistant Registrar.

[fol. 22] IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

OPINION—Sept. 11, 1929

RUGG, C. J.:

These are petitions brought, under G. L. c. 65, § 30, to determine the validity of succession taxes. The petitioners

are trustees under a deed and declaration of trust executed on July 29, 1907, by J. Randolph Coolidge and Julia Coolidge and the petitioners.

By that deed a large amount of real and personal estate was transferred to the trustees by the settlors voluntarily and not as a bona fide purchase for full consideration in money or in money's worth. The trustees were given extensive powers of management, investment and reinvestment with the right to determine finally what receipts and payments should be credited to income or principal. The part of the trust fund furnished by J. Randolph Coolidge was four sevenths, and the part furnished by Julia Coolidge was three sevenths. By the terms of the trust the income was to be paid in these proportions to each of the settlors during their joint lives and then the entire income to the survivor, and, upon the death of the survivor, the principal was to be divided equally among their five sons, provided that, if any of the sons should predecease the survivor of the settlors, his share should go to those entitled to take his interstate property under the statute of distributions in force at the death of such survivor, with a further provision to the effect that in no event should a widow of such deceased son take as distributee more than half of such share. There was in the declaration of trust no power of revocation or modification or termination prior to the death of the survivor of the settlors. Coolidge v. Loring, 235 Mass. 220. By instrument executed on April 6, 1917, the settlors assigned their interest in the trust to the five [fol. 23] sons, all of whom eventually survived the termination of the trust. Julia Coolidge died in January, 1921, and J. Randolph Coolidge on November 10, 1925, both being residents of this Commonwealth. The defendant determined that the petitioners were subject to excise taxes under G. L. c. 65, § 1, as amended, upon the four sevenths and upon the three sevenths of the trust estate furnished respectively by each settlor as of November 10, 1925.

There is no controversy as to the amount of the excise if any is due.

When the declaration of trust was executed, no statute was operative under which the trust property could have been subjected to an excise because the succession was to direct descendants of the settlors.

Statutes then in force provided for levy of an excise only where the succession was to collateral relatives and to strangers. There had been approved on June 27, St. 1907, c. 563, which took effect on September 1, 1907, about five weeks after the date of the declaration of trust. This is the first relevant statute. Its provisions were:

§1. "All property within the jurisdiction of the Commonwealth * * * which shall pass by * * * deed, grant, or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person * * * shall be subject to a tax * * *" §25. "This act shall not apply to estates of persons deceased prior to the date when it takes effect, or to property passing by deed, grant, sale, or gift made prior to said date * * *" Said §1 was amended in particulars not here material by St. 1912, c. 678, §1.

It was provided by §3 of the latter statute: "The provisions of section one of this act shall apply to the estates of all persons dying subsequent to the passage hereof, and to all property passing by deed, grant or gift except in [fol. 24] cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor or donor, if such death occurs subsequent to the passage hereof * * *"

Said §25 was amended by St. 1914, c. 563, §1, so as to read: "This part shall not apply to * * * property passing by deed, grant, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor when such death occurred prior to said date (September 1, 1907) * * *" The relevant statutory provisions operative since January 1, 1921, are in G. L. c. 65, as follows:

§1. "All property within the jurisdiction of the commonwealth * * * which shall pass by * * * deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth * * * made or intended to take effect in possession or enjoyment after his death * * * to any person, absolutely or in trust * * * shall be subject to a tax * * *"; §36. "This chapter shall apply

only to property or interests therein passing or accruing upon the death of persons dying on or after May fourth, nineteen hundred and twenty * * *"

The question for decision is whether the net trust estate passing to the sons on the death of the surviving settlor is subject to excise taxes under these statutes.

The "tax authorized by these statutes is a tax upon 'succession' which includes the 'privileges enjoyed by the beneficiary of succeeding to the possession and enjoyment of property.' See Attorney General v. Stone, 209 Mass. 186, 190; Minot v. Winthrop, 162 Mass. 113, 124; Crocker v. Shaw, 174 Mass. 266, 267 * * * we are here concerned, not with a tax on the privilege of transmission, not with an [fol. 25] attempt to tax a donor's estate for an absolute gift made when no tax was thought of, * * * but with a tax on the privilege of succession, which also may constitutionally be subjected to a tax by the state whether occasioned by death, Stebbins v. Riley * * * (268 U. S. 137), or effected by deed, Keeney v. New York, 222 U. S. 525; Chanler v. Kelsey * * * (205 U. S. 466); Nickel v. Cole * * * (256 U. S. 222).

The present tax is not laid on the donor, but on the beneficiary; the gift taxed is not one long since completed, but one which never passed to the beneficiaries beyond recall until the death of the donor. * * * So long as the privilege of succession has not been fully exercised it may be reached by the tax." Saltonstall v. Saltonstall, 276 U. S. 260, 269, 270, 271, affirming Saltonstall v. Treasurer & Receiver General, 256 Mass. 519, where earlier Massachusetts decisions are reviewed. Boston Safe Deposit & Trust Co. v. Commissioner of Corporations & Taxation, Mass. Adv. Sh. (1929) 1233, 1235.

The settlors by the deed of July, 1907, divested themselves of all power of disposition over the principal of the trust. It then passed irrevocably from their control. After that they possessed only rights to the income.

Thus they did not divest themselves of all interest in the property. They stripped themselves of those rights in April, 1917. That is not pertinent to the issues here involved because before that time the statute had been changed as to taxation of successions so as to include the kind of succession established by the deed of July, 1907.

Confessedly at the time of the execution of the trust deed there was no statute exacting an excise on the transfer of the property or on succession to it. This, however, in [fol. 26] our opinion is not a decisive factor. The present excise under the statute was levied on the succession, not on the transmission, of the trust fund.

As already pointed out succession is a quite different thing from transmission. It is manifest from the terms of the declaration of trust that the death of the survivor of the settlors was expressly fixed as the effective date of succession by the final beneficiaries to the enjoyment of the principal and income of the trust estate.

The excise statute here controlling and already quoted is designed to include within its sweep all methods of succession to property to take effect in possession on enjoyment after the death of the grantor or donor other than those made inter vivos for a bona fide consideration.

By express words it embraces succession created by deed. Whenever property is conveyed upon such limitation that it will vest in interest, possession or enjoyment by reason of the death of the grantor or donor, such succession falls within the descriptive words of the statute.

The succession to any of these attributes of property occurring as the result of the death of the grantor or donor constitutes the taxable commodity. Magee v. Commissioner of Corporations & Taxation, 256 Mass. 512, 515.

The assignment of their life interest in the income of the trust by the settlors to their sons in 1917 did not operate to alter the nature of the trust instrument or of the transaction out of which spring the rights of the final beneficiaries. It is obvious that this assignment did not, even in combination with the trust instrument of July, 1907, vest the entire interest in the trust in the five sons.

That was recognized by the position of the trustees, set- [fol. 27] tlors and sons in Coolidge v. Loring, 235 Mass. 220, 222, where reformation of the trust instrument of July, 1907, was sought, because the demand on the trustees by the sons after the assignment for immediate distribution of the fund had been refused by reason of the "possible claim of a contingent interest on behalf of wives and children of sons pre-deceasing" the settlors. If no ultimate succession had been contemplated under the trust instrument of

July, 1907, the assignment to the sons of the life interests of the settlors would have vested in the sons such complete interest in the trust fund that they would have been in effect absolute owners of it, and it might have been reasonable and just that they should have had the control and disposal of it, unless some good cause appeared to the contrary. Sears v. Hardy, 120 Mass. 524. Sears v. Choate, 146 Mass. 395, 398. Claflin v. Claflin, 149 Mass. 19, 22. Langley v. Conlan, 212 Mass. 135, 138. See Forbes v. Snow, 245 Mass. 85, 93, and Abbott v. Williams, Mass. Adv. Sh. (1929) 1667, 1669. But manifestly the trust could not then terminate, because the succession could not take place or be ascertained until the death of the survivor of the settlors.

It is not necessary to the validity of the excise on succession that an interest in the property pass directly from the grantor or settlor at the time of his death. Boston Safe Deposit & Trust Co. v. Commissioner of Corporations & Taxation, Mass. Adv. Sh. (1929) 1233, 1237. If the beneficiary under the instrument of gift succeeds to an interest in the property not previously enjoyed, which bears a distinct and necessary relation to the death of the grantor or settlor, that is a succession subjected to the excise by the terms of the statute.

Plainly under the deed of July, 1907, the ultimate beneficiaries could not be determined with certainty until the death of both settlors.

[fol. 28] However unlikely, it nevertheless was possible that all or any number less than all of the five sons might predecease the survivor of the settlors. Which ones, if any of them, might so predecease could not be known until both settlors had died. No possession, enjoyment or title to the trust would ultimately vest in any son so predeceased or in his estate.

The interest of the sons surviving the settlors in the trust fund did not pass to them finally and irrevocably until and because of the death of both settlors. The property conveyed to the trustees by the deed of trust was so limited that it vested in the sons who should survive both settlors in interest, possession and enjoyment only by reason of and upon the death of the survivor of the settlors. This succession falls within the descriptive words of the

statute. The five sons of the settlors, who have become the ultimate beneficiaries of the trust, had no power of control individually or collectively over the trust fund while either of the settlors continued to live. They had no possession of it. That was vested exclusively in the trustees. They had no enjoyment of the trust fund, except as a vision of the future. They had no power of disposal of the whole or any part of the corpus of the trust estate. That power was enjoyed by the trustees alone. The extent of their interest was, at most, a remainder subject to be divested upon a condition subsequent with a limitation over upon the happening of that contingency. Clarke v. Fay, 205 Mass. 228, where cases are collected and reviewed. Blanchard v. Blanchard, 1 Allen, 223, 226. The nature of their interest might be the subject of assignment. Other interests of which the assignor has no possession or enjoyment may be assigned.

Citizens Loan Association v. Boston & Maine Railroad, 196 Mass. 528, 530, 531. Taylor v. Barton Child Co. 228 Mass. [fol. 29] 126, 130. Such rights are potential only and not vested in possession and enjoyment.

Under the deed of trust while either settlor lived the sons had no unrestricted right to receive and to use the proceeds of the property such as came to them upon the death of the last surviving settlor.

It is that succession to unrestricted and absolute title, in place of no possession or enjoyment whatever and a contingency as to title, which is made subject to the excise under the statute. The acquisition of the rights which accrued to the five sons on the death of the last settlor was a fundamental change in the nature of their relation to and interest in the trust.

It replaced a contingency with a certainty. Full title, complete and unrestricted in every particular, did not vest in them until that event. By that event the actual transfer of the possession of the trust fund passed under the terms of the deed of July, 1907, from the trustees to the five sons and the full enjoyment thereof as to title and income for the first time became theirs. It seems to us that this change constituted a succession. The excise is not levied on mere enjoyment, possession or ownership: it is levied upon the assured and completed ripening of a more or less

tenuous, dubious and immature right into actual possession, irrevocable enjoyment and full title. We think that this constituted a succession which lawfully might be made subject to the excise by a statute enacted and effective before such succession took place.

This is the inevitable result of our own decisions. Numerous excerpts from opinions written by judges eminent for learning and wisdom leading to that conclusion are collected in Magee v. Commissioner of Corporations & Taxation, 256 Mass. 512, 515, 516, and in Saltonstall v. Treasurer & Receiver General, 256 Mass. 519, 523, 524. It seems unnecessary to repeat them. They are referred to [fol. 30] as in part the basis of this decision. In discussion as to the nature of succession and the accrual of rights made subject to the excise upon succession, it was said in State Street Trust Co. v. Treasurer & Receiver General, 209 Mass. 373, at page 378: "The test * * * by which * * * exemption (from the excise) is to be ascertained does not depend upon whether a power to revoke has or has not been inserted, but upon the passing of the property with all the attributes of ownership independently of the death of the transferror. It is the absence of the power of control with the unrestricted right of the recipient to dispose of the property and to receive and use the proceeds, which by the express language of the statute subjects it to the tax * * * the intention of the settlor is plain, that the principal, even if it vested in title, was not to vest in possession and enjoyment during her life."

The test thus stated supports the excise here assailed. Although the facts in the case at bar differ in some particulars from those in Saltonstall v. Saltonstall, 276 U. S. 260, we think that that decision supports the conclusion that these excises might lawfully be levied.

The principle that no law is to be construed as operating retro-actively unless imperatively required by the words of the statute is recognized. Hanscom v. Malden & Melrose Gas Light Co., 220 Mass. 1, where cases are reviewed. Fullerton-Krueger Lumber Co. v. Northern Pacific Railway, 266 U. S. 435, 437. That principle is not here applicable because the succession, which is the subject of the excise, was not fully accomplished until after the enactment of the governing statute. Tax laws are to be strictly

construed and every doubt resolved in favor of the taxpayer. Eaton, Crane & Pike Co. v. Commonwealth, 237 Mass. 523. The words of the already quoted statutes, con- [fol. 31] strued according to the natural and approved usage of the language, plainly include within their ambit such a succession as here has been taxed. "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." United States v. Jin Fuey Moy, 241 U. S. 394, 401. Kennedy v. Commissioner of Corporations & Taxation, 256 Mass. 426, 430. The authorities already cited appear to us to establish the constitutionality of the statute under which this excise was laid. Giving full weight to all these principles, they do not militate against the constitutionality of the present statute and of the excise levied thereunder.

The succession, as here defined and made subject to the excise, has been recognized for many years as a commodity which rightly may be made subject to an excise. Minot v. Winthrop, 162 Mass. 113, 115-122. Callahan v. Woodbridge, 171 Mass. 595, 597. Crocker v. Shaw, 174 Mass. 266, 267. Minot v. Treasurer & Receiver General, 207 Mass. 588. Attorney General v. Stone, 209 Mass. 186. Burnham v. Treasurer & Receiver General, 212 Mass. 165. Clark v. Treasurer & Receiver General, 226 Mass. 301, 305. The element of succession being the taxable commodity does not deny to the petitioners the equal protection of the laws nor does it deprive them of property without due process of law. Cohen v. Brewster, 203 U. S. 543. Chanler v. Kelsey, 205 U. S. 466. Nickel v. Cole, 256 U. S. 222. Saltonstall v. Saltonstall, 276 U. S., 260.

The validity of the present statute under the Constitution of the United States and of this Commonwealth appears to us to be established by these and the other authorities already cited.

The case at bar is distinguishable from Shwab v. Doyle, 258 U. S. 529, Shukert v. Allen, 273 U. S. 545, Nichols v. [fol. 32] Coolidge, 274 U. S. 531, Reinecke v. Northern Trust Co. 278 U. S. 339, 345, 347, and Chase National Bank v. United States, 278 U. S. 327. In each of those cases the tax under consideration was the Federal estate tax levied upon the property of the deceased transmitted at his death.

That is a tax levied upon a subject quite different from the succession to property by a beneficiary, which is the subject of the present excise.

The case at bar is distinguishable from Dexter v. Treasurer & Receiver General, 243 Mass. 523, 525. In that case it was held that the "property" passed not upon the death of the donor but upon an outside event, and that "it did not pass by deed intended to take effect in possession or enjoyment after his death." The same in substance is true of People v. Northern Trust Co. 330 Ill. 238. The case at bar also is distinguishable from the points decided in First National Bank v. Commissioner of Corporations & Taxation, 258 Mass. 253.

It follows that each petition for abatement must be denied and decrees are to be entered to that effect.

Ordered accordingly.

Norfolk County:

A true copy of an attested true copy. Attest: James F. Reynolds, Assistant Registor.

Certificate to foregoing paper omitted in printing.

[fol. 33] In Probate Court of Norfolk County

Final Decree

At a Probate Court holden at Dedham, in and for said County of Norfolk, on the 23rd day of December in the year of our Lord one thousand nine hundred and twenty-nine.

On the petition in equity of Harold J. Coolidge and Augustus P. Loring, trustees under a certain deed and declaration of trust (dated July 20, 1907) executed by J. Randolph Coolidge and Julia Coolidge for the benefit of J. Randolph Coolidge, Jr., and others, against Henry F. Long, Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts, respondent, praying that a certain inheritance tax referred to in said petition be abated, it appearing that notice according to the order of the Court was given the respondent, that the respondent, having been notified according to the order of the Court,

duly appeared and answered, that the petition came on to be heard in this Court upon the pleadings and certain agreed facts, that the petitioners duly presented seven requests for rulings of law, that the petition was thereupon reserved and reported for the determination of the Supreme Judicial Court, (said requests for rulings being embodied in the reservation and report), and that a rescript has been received from the Supreme Judicial Court, this Court, after hearing and consideration and in accordance with said rescript and with the opinion referred to therein, doth order and decree that said requests for rulings be and they hereby are severally denied and that said petition be and it hereby is dismissed.

Joseph R. McCoole, Judge of Probate Court.

[fol. 34] Dec. 6, 1929.

This decree is satisfactory in form to the respondent.

Henry F. Long, Commissioner, by Joseph E. Warner, Atty. Gen., by James S. Eastham, Asst. Atty. General.

Norfolk County:

A true copy. Attest: James F. Reynolds, Assistant Register.

[fol. 35] In Probate Court of Norfolk County

[Title omitted]

Petition for Appeal, Assignment of Errors, and Prayer for Reversal—Filed Dec. 23, 1929

Considering themselves aggrieved by the final decree entered in the above-entitled cause (pursuant to the decision and rescript of the Supreme Judicial Court of the Commonwealth of Massachusetts) by the Probate Court for the County of Norfolk in said Commonwealth under the docket number 59725 the petitioners therein, Harold J. Coolidge and Augustus P. Loring, trustees under a trust indenture (dated July 20, 1907) executed by J. Randolph Coolidge and Julia Coolidge for the benefit of J. Randolph Coolidge, Jr., and others, hereby pray that an appeal be allowed to

the Supreme Court of the United States herein and that there be entered an order fixing the amount of the bond on such appeal.

Said Harold J. Coolidge and Augustus P. Loring, trustees as aforesaid, assign the following errors in the record and proceedings herein:

1. Said Supreme Judicial Court erred in refusing to hold that Section 1 of Chapter 65 of the General Laws of Massachusetts (as construed by said court) is repugnant to Section 10 of Article 1 of the Constitution of the United States in that it impairs the obligation of the contract embodied in said trust indenture.

[fol. 36] 2. Said Probate Court erred in denying the petitioners' request that it rule that, if said Section 1 purports to authorize the imposition of the tax now in question, it is repugnant to Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of the contract embodied in said trust indenture.

3. Said Supreme Judicial Court erred in refusing to hold that said Section 1 (as construed by said Court) is repugnant to Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of the contract embodied in the instrument dated April 6, 1917, whereby said J. Randolph Coolidge and Julia Coolidge assigned all their interest in the fund held in trust under said indenture to J. Randolph Coolidge, Jr., and others.

4. Said Probate Court erred in denying the petitioners' request that it rule that, if said Section 1 purports to authorize the imposition of the tax now in question, it is repugnant to Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of the contract embodied in the instrument dated April 6, 1917, whereby said J. Randolph Coolidge and Julia Coolidge assigned all their interest in the fund held in trust under said indenture to J. Randolph Coolidge, Jr., and others.

5. Said Supreme Judicial Court erred in refusing to hold that said Section 1 (as construed by said court) deprives the petitioners and those claiming under them of their property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

6. Said Probate Court erred in denying the petitioners' request that it rule that, if said Section 1 purports to au- [fol. 37] thorize the imposition of the tax now in question, it deprives the petitioners and those claiming under them of their property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

7. Said Supreme Judicial Court erred in refusing to hold that said Section 1 (as construed by said court) denies to the petitioners and those claiming under them the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

8. Said Probate Court erred in denying the petitioners' request that it rule that, if said Section 1 purports to authorize the imposition of the tax now in question, it denies to the petitioners and those claiming under them the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

9. Said Supreme Judicial Court erred in holding that the tax now in question was lawfully assessed and that the petitioners are not entitled to the abatement thereof.

10. Said Probate Court erred in denying the petitioners' prayer for abatement and in dismissing their petition.

For which errors said petitioners Harold J. Coolidge and Augustus P. Loring, trustees under said trust indenture, pray that the final decree of the Probate Court for the County of Norfolk in the Commonwealth of Massachusetts entered in the above entitled cause on December 23, 1929, (pursuant to the decision and rescript of the Supreme Judicial Court of said Commonwealth) be reversed and a decree entered in favor of said petitioners and for their costs.

Storey, Thorndike, Palmer & Dodge, Solicitors for Appellants.

NORFOLK COUNTY:

A true copy. Attest: James F. Reynolds, Assistant Register. (Seal.)

[fol. 38] In Probate Court of Norfolk County

[Title omitted]

Order Allowing Appeal. Filed Dec. 23, 1929

The appellants in the above-entitled suit and each of them having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the decree entered in the above-entitled suit by the Probate Court for the County of Norfolk in the Commonwealth of Massachusetts under the docket number 50725 on the twenty-third day of December 1929, and from each and every part thereof and having presented and filed their petition for appeal, assignment of errors and prayer for reversal pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided; it is hereby ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States from the Probate Court for the County of Norfolk and Commonwealth of Massachusetts in the above-entitled cause as provided by law and it is further ordered that the register of probate for said County of Norfolk shall prepare and certify a transcript of the record, proceedings and decree in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said court within thirty days of this date.

[fol. 39] And it is further ordered that security for costs on appeal be fixed in the sum of $100, for which sum a bond without surety is to be filed by the appellants.

Joseph R. McCoole, Judge of the Probate Court for the County of Norfolk, in the Commonwealth of Massachusetts.

Norfolk County:

A true copy. Attest: James F. Reynolds, Assistant Register. (Seal.)

[fols. 40 & 41] Bond on appeal for $100.00 approved and filed December 23, 1929.

[fols. 42 & 43] Citation, in usual form, showing service on Joseph E. Warner, omitted in printing.

[fol. 44] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation to Print Entire Record—Filed Jan. 18, 1930

The appellants adopt their assignments of error as their statement of the points to be relied upon and represent that the whole of the record as filed (other than the bond on appeal) is necessary for the consideration of the case.

Robert G. Dodge, Counsel for Appellants.

Boston, Mass., January 16, 1930.

Due and sufficient service of the foregoing statement and designation is hereby acknowledged.

Joseph E. Warner, Attorney General of Massachusetts, by R. Ammi Cutter, Assistant Attorney General of Massachusetts.

[fol. 45] [File endorsement omitted.]

Endorsed on cover: File No. 34,714. Massachusetts Probate Court for the County of Norfolk. Term No. 583. Harold J. Coolidge and Augustus P. Loring, trustees, appellants, vs. Henry F. Long, Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts. Filed January 18, 1930. File No. 34,714.

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1929~~ 1930

No. ~~584~~ 34

HAROLD J. COOLIDGE AND AUGUSTUS P. LORING, TRUSTEES, APPELLANTS,

vs.

HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS

APPEAL FROM PROBATE COURT OF NORFOLK COUNTY, STATE OF MASSACHUSETTS

FILED JANUARY 18, 1930

(34,715)

(34,715)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 584

HAROLD J. COOLIDGE AND AUGUSTUS P. LORING, TRUSTEES, APPELLANTS,

vs.

HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS

APPEAL FROM THE PROBATE COURT OF NORFOLK COUNTY, STATE OF MASSACHUSETTS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 27, 1930

[fol. a]

IN PROBATE COURT OF NORFOLK COUNTY

HAROLD J. COOLIDGE and AUGUSTUS P. LORING, Trustees, Appellants,

v.

HENRY F. LONG, Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby agreed that the portions of the record hereinafter specified and no others be included in the transcript to be transmitted to the Supreme Court of the United States in connection with the appeal of Harold J. Coolidge and Augustus P. Loring, trustees, from the decree entered by the Probate Court for the County of Norfolk in the Commonwealth of Massachusetts on December 23, 1929, dismissing the petition brought by them against Henry F. Long, Commissioner of Corporations and Taxation of said Commonwealth, for the abatement of an inheritance tax assessed upon the estate of Julia Coolidge:

1. Petition (filed November 8, 1927).
2. Motion to amend petition (allowed December 21, 1927).
3. Answer.
4. Stipulation (including copy of declaration of trust and copy of assignment).
5. Reservation and report.
6. Supplement to reservation.
7. Rescript.
8. Opinion of Supreme Judicial Court.
9. Final decree after rescript (entered December 23, 1929).

[fol. b] 10. Petition for appeal, assignment of errors and prayer for reversal.

11. Order allowing appeal.
12. Bond on appeal.

13. Citation (with acceptance of service).
Storey, Thorndike, Palmer & Dodge, Solicitors for Appellants. Joseph E. Warner, Attorney General, by James S. Eastham, Ass't Atty. General.

NORFOLK COUNTY:

A true copy. Attest: James F. Reynolds, Assistant Register. (Seal.)

[fol. 1] IN PROBATE COURT OF NORFOLK COUNTY

PETITION—Filed Nov. 8, 1927

To the Honorable the Judge of the Probate Court in and for the County of Norfolk:

Respectfully represent Harold J. Coolidge of Boston, Suffolk County, Massachusetts, and Augustus P. Loring, of Beverly, Essex County, Massachusetts, petitioners, that they bring this petition against the Commissioner of Corporations and Taxation, respondent, and allege him to be the only party interested in the matter of [redacted] petition, and further represent that they are the Trustees under a certain deed and declaration of trust, dated July 29, 1907, for the benefit of J. Randolph Coolidge et alii; that on November 10, 1926, they paid under protest taxes in the amount of $20,082.01 assessed by the Commissioner of Corporations and Taxation on account of property passing under the said deed and declaration of trust; that as such Trustees they are aggrieved by the determination of the tax liability and assessment as aforesaid.

Wherefore your petitioners respectfully pray for the abatement of said taxes, or so much thereof as your Honorable Court may determine to have been assessed without authority at law.

[fol. 2] Dated this seventh day of November, 1927.

Harold J. Coolidge, Augustus P. Loring.

The undersigned, being all the persons interested in the subject-matter of the above petition, hereby accept service of the same.

——, ——.

Norfolk County:

A true copy. Attest: James F. Reynolds, Assistant Register. (Seal.)

[fol. 2½] [File endorsement omitted.]

[fol. 3] In Probate Court of Norfolk County

(Estate of J. Randolph Coolidge)

Harold J. Coolidge et al., Trustees,

v.

Commissioner of Corporations and Taxation

Motion to Amend Petition and Order Allowing Same

Now come the above named petitioners and move to amend the petition so that it will read in accordance with the copy hereto annexed.

Harold J. Coolidge, Augustus P. Loring, Trustees.

Dec. 21, 1927.

Motion to amend allowed.

Joseph R. McCoole, Judge Probate Court.

[fol. 4] In Probate Court of Norfolk County

Amended Petition—Filed Dec. 14, 1927

To the Honorable the Judge of the Probate Court in and for the County of Norfolk:

Respectfully represents Harold J. Coolidge, of Boston, Suffolk County, Massachusetts, and Augustus P. Loring, of Beverly, Essex County, Massachusetts, trustees, petitioners, that they bring this petition against the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts, respondent, and allege him to be the only party interested in the matter of said petition, and further

represent that they are the trustees under a certain deed and declaration of trust dated July 29, 1907, executed by J. Randolph Coolidge and Julia Coolidge for the benefit of J. Randolph Coolidge, Jr., and others; that J. Randolph Coolidge has died leaving an estate within the jurisdiction of the Probate Court for the County of Norfolk; that the respondent has assessed an inheritance tax upon the estate of said J. Randolph Coolidge and as a part thereof has assessed a tax in the amount of $25,201.82 upon the interests passing under said deed and declaration of trust; that your petitioners on November 10, 1926 paid under protest the said amount of $25,201.82; that they are aggrieved by the determination of said tax and its assessment as aforesaid.

Wherefore your petitioners respectfully pray that said tax may be abated in full and that the respondent may be ordered to repay them the amount thereof with interest and costs.

[fol. 5] Dated this 7th day of November, 1927.

Harold J. Coolidge, Augustus P. Loring, Trustees.

The undersigned, being all the persons interested in the subject matter of the above petition, hereby accept service of the same.

——— ———.

Norfolk County:

A true copy. Attest: James F. Reynolds, Assistant Register. (Seal.)

[fol. 5½] [File endorsement omitted.]

[fol. 6] In Probate Court of Norfolk County

[Title omitted]

Answer—Feb. 3, 1928

Now comes Henry F. Long, as he is Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts, and for answer to the petition herein filed says as follows:

1. He admits that the petitioners are trustees under a certain deed and declaration of trust, dated July 29, 1907, for the benefit of J. Randolph Coolidge et alii; that on November 10, 1926, they paid under protest taxes in the amount of $25,201.82 assessed by him as said Commissioner on account of property passing under the said deed and declaration of trust; but denies each and every other allegation of fact or conclusion of law contained in the said petition.

2. In particular the Commissioner denies that the petitioners as such trustees were aggrieved by the determination of the tax liability and assessment as aforesaid, but says that the said tax was properly determined and assessed by him as Commissioner.

Wherefore he prays that the petition be dismissed, with costs to be paid by the petitioners.

Henry F. Long, Commissioner of Corporations and Taxation, by Arthur K. Reading, Attorney General, by James S. Eastham, Assistant Attorney General.

Norfolk County:

A true copy. Attest: James F. Reynolds, Assistant Register. (Seal.)

[fol. 7] In Probate Court of Norfolk County

[Title omitted]

Stipulation as to Facts—May 28, 1928

In the above-entitled cause and for the purposes thereof, and for none other, it is hereby stipulated and agreed as follows:

1. J. Randolph Coolidge, husband of Julia Coolidge, died November 10, 1925, a resident of Brookline, Massachusetts.

2. On July 29, 1907 J. Randolph Coolidge joined with his wife in transferring certain real and personal property to trustees, and the trustees executed a declaration of trust, a copy of which is hereto annexed.

3. The said transfer was voluntary and was not a bona fide purchase for full consideration in money or money's worth.

4. Four-sevenths of the property conveyed to the trustees as aforesaid was furnished by J. Randolph Coolidge and three-sevenths by his wife.

5. On April 6, 1917, J. Randolph Coolidge and his wife executed an assignment of all their interest in the trust funds and all their right to receive the income therefrom to their sons J. Randolph Coolidge, Jr., John G. Coolidge, Archibald C. Coolidge, Harold J. Coolidge, and Julian L. Coolidge. A copy of this assignment is hereto annexed.

[fol. 8] 6. The said five sons were all living at the death of J. Randolph Coolidge who survived his wife Julia Coolidge and died November 10, 1925.

7. As of the said date of the death of J. Randolph Coolidge the value of four-sevenths of the property then held by the petitioners as the present trustees under the aforesaid declartion of trust was $669,400.41. As a result of changes of investments the said property was not the same as that originally in the trust.

8. The Commissioner of Corporations and Taxation determined that the petitioners were subject to an inheritance tax under G. L. c. 65, s. 1 as amended upon the aforesaid four-sevenths of the net trust property as of November 10, 1925 and accordingly assessed a tax of $25,201.82 which the petitioners paid under protest on November 10, 1926.

9. If the trust property is subject to an inheritance tax the amount was correctly figured by the Commissioner.

Harold J. Coolidge, Augustus P. Loring, Trustees, by Robert G. Dodge, Att'y. Henry F. Long, Commissioner of Corporations and Taxation, by James S. Eastham, Assistant Attorney General.

[fol. 9] EXHIBIT TO STIPULATION

Declaration of Trust

Whereas J. Randolph Coolidge of Brookline, in the county of Norfolk and Commonwealth of Massachusetts, has by

his deed of even date herewith conveyed certain real estate situated in Boston, county of Suffolk and Commonwealth aforesaid, to wit: A parcel of land, with the buildings thereon numbered 19 to 25 High Street, 175 to 179 Federal Street, and 150 to 152 Summer Street in said Boston, to Augustus P. Loring of Beverly, county of Essex and Commonwealth aforesaid to the use of the said J. Randolph Coolidge, and of the said Augustus P. Loring and of Harold J. Coolidge of said Boston, and the survivor of them, in trust upon certain trusts; and

Whereas Julia Coolidge of said Brookline, wife of the said J. Randolph Coolidge, has by her deed of even date herewith conveyed certain real estate situated in said Boston, to wit: Two several parcels of land, with the buildings thereon, one of them being numbered 62 to 64 Sumner Street, and the second numbered 26 to 30 on Federal Street and 127 on Congress Street, in said Boston, to the said Augustus P. Loring to the use of the said J. Randolph Coolidge, Augustus P. Loring and Harold J. Coolidge, and the survivor of them, in trust upon the same trusts; and

Whereas the said J. Randolph Coolidge and the said Julia Coolidge have each of them by an instrument executed on the twenty-ninth day of July, 1907, assigned and transferred certain personal property as described in the schedule annexed to said instruments, to the aforesaid J. Randolph Coolidge, Augustus P. Loring, and Harold J. Coolidge, to hold as trustees upon the same trusts; and

Whereas the said J. Randolph Coolidge and Julia Coolidge may prior to the first of September, 1907, convey or [fol. 10] transfer other real estate or personal property to the said trustees to be held upon the same trusts; therefore, be it known, that we, the above-mentioned J. Randolph Coolidge, Augustus P. Loring, and Harold G. Coolidge, do hereby declare that we do hold upon the following trusts, the said real estate and personal property herein referred to, and such other property as may be conveyed or assigned to us prior to September 1, 1907, to hold upon the terms of this trust, together with all accumulations and accretions of the trust fund hereby created, and all property substituted for the original fund under the powers herein given:

1st. In trust to pay the net income of the trust fund to the said J. Randolph Coolidge and the said Julia Coolidge

four sevenths (4/7) and three sevenths (3/7) respectively to each so long as they both live, and to pay the whole of said net income to the survivor and upon the death of the survivor to distribute equally the trust property among the following persons who are children of the said J. Randolph Coolidge and Julia Coolidge, viz: J. Randolph Coolidge, jr., John Gardner Coolidge, Archibald Cary Coolidge, Harold J. Coolidge, and Julian L. Coolidge; and should any of said persons predecease the survivor of the said J. Randolph Coolidge and Julia Coolidge, to pay the share of the person so predeceasing to those who would be entitled to take his intestate property under the statute of distributions in effect at the time of the death of such survivor, provided that in no case shall a surviving widow take as distributee, more than one-half of said share.

2nd. The trustees shall have full power to make, vary, and change investments, and may invest in such real estate, personal property, stocks, bonds and other securities [fol. 11] or property as in their opinion are proper investments for this trust fund.

3rd. They may sell any or all the trust property original-accruing or substituted, at such times, in such manner, and for such considerations as they think fit, and may convey the same in fee or for any less estate, and no purchaser shall be required to see to the application of the purchase money paid by him to the trustees or either of them.

4th. They may, in their uncontrolled discretion let or lease the real estate on short or long leases, or on building leases, part of the consideration for which is the improvement of the premises; and no lessee shall be liable for the application of any payment of money made to the trustees or any of them.

5th. They may improve, alter, or rebuild the trust buildings, or build new buildings on the trust lands or on land acquired for that purpose, and may make contracts binding the trust property for the purpose of carrying out any of their powers; but they shall not bind the beneficiaries of the trust, nor need they bind themselves personally.

6th. They may determine what receipts and payments shall be charged or credited to income or principal, and their determination made in good faith shall be final.

7-. They may employ such brokers, engineers, clerks, collectors, agents, or attorneys as they see fit, and shall not be liable for their misbehavior.

8th. They shall account to the beneficiaries once a year, and shall be entitled to receive as compensation for their services five per cent upon the gross amount of the income, and such compensation for extra services as a majority of those beneficiaries who are sui juris shall approve.

[fol. 12] 9th. All the powers given to the trustees named shall pass to the survivors or survivor and to successors or successor in the trust. At any time when there are three or more trustees in office, any of the trustees may delegate all his powers and authority to the other trustees by any instrument under seal duly recorded, which shall remain in force until revoked by an instrument similarly executed and recorded, provided that such delegated power shall not be exercised by less then two trustees.

10th. Any vacancies in the number of the trustees may be filled or an additional trustee or trustees may be appointed by the trustees or trustee in office with the assent of the majority of the beneficiaries who are sui juris. If there are no trustees in office, then a trustee or trustees may be appointed by not less then three-fourths of the beneficiaries who are sui juris; and all appointments made under the powers given trustees or beneficiaries by this clause shall be made by an instrument in writing signed and sealed by the parties making the appointment and acknowledged by at least one of them. If no appointment is so made within thirty days from the date when there has ceased to be a trustee in office, any party in interest may apply to the probate court for Suffolk County to appoint a new trustee or trustees.

11th. No trustee hereunder shall be required to give a bond for the faithful performance of his duties, nor shall any trustee be liable for the acts or defaults of another trustee; but each trustee shall be liable for his own willful acts or defaults only.

In witness whereof we have hereunto set our hands and seals this twenty-ninth day of July 1907.

J. Randolph Coolidge, Augustus P. Loring, Harold J. Coolidge (and each a seal).

[fol. 13] We, the undersigned J. Randolph Coolidge and Julia Coolidge assent to the above declaration of trust.

J. Randolph Coolidge, Julia Coolidge.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Boston, July 29, 1907.

Then personally appeared the above named J. Randolph Coolidge, Augustus P. Loring, and Harold J. Coolidge and acknowledged the foregoing instrument to be their free act and deed before me.

Harold D. Apollonio, Justice of the Peace.

A true copy of an instrument left for record with Suffolk deeds July 29, 1907, at four o'clock and twenty-seven minutes P. M.

Attest:

(Signed) Wm. T. A. Fitzgerald, Register.

[fol. 14] EXHIBIT TO STIPULATION

Assignment

Whereas J. Randolph Coolidge and Julia Coolidge, his wife, both of Brookline, Norfolk County, Massachusetts, did by certain instruments dated July 29, 1907, convey certain real estate and personal property belonging severally to them to J. Randolph Coolidge, Augustus P. Loring, and Harold J. Coolidge in trust for certain purposes, and

Whereas a certain declaration of trust signed by the said J. Randolph Coolidge, Augustus P. Loring, and Harold J. Coolidge as trustees, and assented to by the said J. Randolph Coolidge and Julia Coolidge, dated on said July 29th, 1907, and recorded in Suffolk Deeds Book 3227, page 260, sets forth the purposes of said trust to be as follows:

To pay the income from the trust fund in certain proportions to the said J. Randolph Coolidge and Julia Coolidge so long as they both live, and to pay the whole of said net income to the survivor; and upon the death of the survivor to distribute equally the trust property among the following named persons who are children of the said J. Randolph Coolidge and Julia Coolidge, viz: J. Randolph

Coolidge, junior, John G. Coolidge, Archibald C. Coolidge, Harold J. Coolidge, and Julian L. Coolidge, and

Whereas the said J. Randolph Coolidge and Julia Coolidge now desire to transfer and assign all their title and interest in and to the income of said trust fund in equal shares to their said five children who are now all living.

Now then, we the said J. Randolph Coolidge and Julia Coolidge in consideration of one dollar and other good and [fol. 15] valuable consideration to us paid by the said J. Randolph Coolidge, jr., John G. Coolidge, Archibald C. Coolidge, Harold J. Coolidge, and Julian L. Coolidge, the receipt whereof is hereby acknowledged, do hereby transfer, convey, and assign to the said J. Randolph Coolidge, jr., John G. Coolidge, Archibald C. Coolidge, Harold J. Coolidge, and Julian L. Coolidge, in equal shares, all our interest in said trust fund, and all our right to receive the income therefrom, including additions thereto and any accrued income which has not already been paid over to us.

To have and to hold the same to the said J. Randolph Coolidge, jr., John G. Coolidge, Archibald C. Coolidge, Harold J. Coolidge, and Julian L. Coolidge, their executors, administrators, and assigns forever.

And we hereby request and direct Harold J. Coolidge and Augustus P. Loring, the present trustees of said fund, henceforth to pay over the income to our said five children in accordance with this assignment.

In witness whereof we hereunto set our hands and seals this sixth day of April, 1917.

(Signed) J. Randolph Coolidge (Seal.) (Signed) Julia Coolidge.

Commonwealth of Massachusetts,
Suffolk, ss:

Boston, April 6, 1917.

Then personally appeared the above named J. Randolph Coolidge and Julia Coolidge, and acknowledged the foregoing instrument by them signed to be their free act and deed.

Before me,

(Signed) Howard S. Patterson, Justice of the Peace.

[fol. 16] We, the undersigned, being the present trustees of the above-mentioned trust fund, hereby acknowledge the receipt of notice of the above assignment.

(Signed) Harold J. Coolidge, Aug. P. Loring.

Norfolk County:

A true copy. Attest: James F. Reynolds, Assistant Register.

[fol. 17] In Probate Court of Norfolk County

[Title omitted]

Reservation and Report—Sept. 12, 1928

These petitions for abatement of the Massachusetts Inheritance Tax, filed by Harold J. Coolidge and Augustus P. Loring trustees under a certain deed and declaration of trust dated July 29, 1907, for the benefit of J. Randolph Coolidge et alii, came before me for final determination, and being in doubt as to the decrees which should be entered I now reserve and report upon the pleadings and stipulations all questions of law for the consideration of the Supreme Judicial Court, in accordance with General Laws, Chapter 215, Section 13 to determine what decrees should be entered.

September 12, 1928.

Joseph R. McCoole, Judge of Probate Court.

Norfolk County:

A true copy. Attest: James F. Reynolds, Assistant Register.

[fol. 18] In Probate Court of Norfolk County

[Title omitted]

Supplement to Reservation—Nov. 7, 1928

The following rulings (which were requested by the petitioners at the hearing upon the above-entitled petition)

may be referred to as a part of the reservation and report of said petition heretofore filed:

1. G. L. c. 65, s. 1, does not, according to its true construction, purport to authorize the imposition of the tax now in question.

2. If G. L. c. 65, s. 1, purports to authorize the imposition of the tax now in question, it is repugnant to Article XII of the Bill of Rights.

3. If G. L. c. 65, s. 1, purports to authorize the imposition of the tax now in question, it is in excess of the power granted to the General Court by Article IV of Section I of Chapter I of the Constitution of Massachusetts.

4. If G. L. c. 65, s. 1, purports to authorize the imposi- of the tax now in question, it is repugnant to Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of the contract embodied in the trust indenture of July 29, 1907.

[fol. 19] 5. If G. L. c. 65, s. 1, purports to authorize the imposition of the tax now in question, it is repugnant to Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of the contract embodied in the assignment of April 6, 1917.

6. If G. L. c. 65, s. 1, purports to authorize the imposition of the tax now in question, it deprives the petitioners and those claiming under them of their property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

7. If G. L. c. 65, s. 1, purports to authorize the imposition of the tax now in question, it denies to the petitioners and those claiming under them the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

Joseph R. McCoole, Judge of Probate Court.

Norfolk County:

A true copy. Attest: James F. Reynolds, Assistant Register.

[fol. 20] In Supreme Judicial Court of Massachusetts

Rescript—Sept. 11, 1929

In the Case of

Harold J. Coolidge et al., Trustees,

vs.

Commissioner of Corporations & Taxation

Pending in the Probate Court for the County of Norfolk

Ordered that the register of probate and insolvency in said county make the following entry under said case in the docket of said court, viz., Decree to be entered denying the petition for abatement.

By the Court.

Walter F. Frederick, Clerk.

September 11, 1929.

[fol. 21] Brief Statement of the Grounds and Reasons of the Decision

The reasons of the decision are set forth in length in the opinion, filed with the reporter of decisions, to which reference is made.

Norfolk County:

A true copy. Attest: James F. Reynolds, Assistant Register.

[fol. 22] In Supreme Judicial Court of Massachusetts

Opinion—Sept. 11, 1929

Rugg, C. J.:

These are petitions brought, under G. L. c. 65, § 30, to determine the validity of succession taxes. The petitioners are trustees under a deed and declaration of trust executed on July 29, 1907, by J. Randolph Coolidge and Julia Coolidge and the petitioners.

By that deed a large amount of real and personal estate was transferred to the trustees by the settlors voluntarily and not as a bona fide purchase for full consideration in money or in money's worth. The trustees were given extensive powers of management, investment and reinvestment with the right to determine finally what receipts and payments should be credited to income or principal. The part of the trust fund furnished by J. Randolph Coolidge was four sevenths, and the part furnished by Julia Coolidge was three sevenths. By the terms of the trust the income was to be paid in these proportions to each of the settlors during their joint lives and then the entire income to the survivor, and, upon the death of the survivor, the principal was to be divided equally among their five sons, provided that, if any of the sons should predecease the survivor of the settlors, his share should go to those entitled to take his interstate property under the statute of distributions in force at the death of such survivor, with a further provision to the effect that in no event should a widow of such deceased son take as distributee more than half of such share. There was in the declaration of trust no power of revocation or modification or termination prior to the death of the survivor of the settlors. Coolidge v. Loring, 235 Mass. 220. By instrument executed on April 6, 1917, the settlors assigned their interest in the trust to the five [fol. 23] sons, all of whom eventually survived the termination of the trust. Julia Coolidge died in January, 1921, and J. Randolph Coolidge on November 10, 1925, both being residents of this Commonwealth. The defendant determined that the petitioners were subject to excise taxes under G. L. c. 65, § 1, as amended, upon the four sevenths and upon the three sevenths of the trust estate furnished respectively by each settlor as of November 10, 1925.

There is no controversy as to the amount of the excise if any is due.

When the declaration of trust was executed, no statute was operative under which the trust property could have been subjected to an excise because the succession was to direct descendants of the settlors.

Statutes then in force provided for levy of an excise only where the succession was to collateral relatives and to strangers. There had been approved on June 27, St. 1907,

c. 563, which took effect on September 1, 1907, about five weeks after the date of the declaration of trust. This is the first relevant statute. Its provisions were:

§1. "All property within the jurisdiction of the Commonwealth * * * which shall pass by * * * deed, grant, or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person * * * shall be subject to a tax * * *" §25. "This act shall not apply to estates of persons deceased prior to the date when it takes effect, or to property passing by deed, grant, sale, or gift made prior to said date * * *" Said § 1 was amended in particulars not here material by St. 1912, c. 678, § 1.

It was provided by § 3 of the latter statute: "The provisions of section one of this act shall apply to the estates of all persons dying subsequent to the passage hereof, and to all property passing by deed, grant or gift except in [fol. 24] cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor or donor, if such death occurs subsequent to the passage hereof * * *"

Said § 25 was amended by St. 1914, c. 563, § 1, so as to read: "This part shall not apply to * * * property passing by deed, grant, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor when such death occurred prior to said date (September 1, 1907) * * *" The relevant statutory provisions operative since January 1, 1921, are in G. L. c. 65, as follows:

§1. "All property within the jurisdiction of the commonwealth * * * which shall pass by * * * deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth * * * made or intended to take effect in possession or enjoyment after his death * * * to any person, absolutely or in trust * * * shall be subject to a tax * * *"; §36. "This chapter shall apply only to property or interests therein passing or accruing upon the death of persons dying on or after May fourth, nineteen hundred and twenty * * *"

The question for decision is whether the net trust estate passing to the sons on the death of the surviving settlor is subject to excise taxes under these statutes.

The "tax authorized by these statutes is a tax upon 'succession' which includes the 'privileges enjoyed by the beneficiary of succeeding to the possession and enjoyment of property.' See Attorney General v. Stone, 209 Mass. 186, 190; Minot v. Winthrop, 162 Mass. 113, 124; Crocker v. Shaw, 174 Mass. 266, 267 * * * we are here concerned, not with a tax on the privilege of transmission, not with an [fol. 25] attempt to tax a donor's estate for an absolute gift made when no tax was thought of, * * * but with a tax on the privilege of succession, which also may constitutionally be subjected to a tax by the state whether occasioned by death, Stebbins v. Riley * * * (268 U. S. 137), or effected by deed, Keeney v. New York, 222 U. S. 525; Chanler v. Kelsey * * * (205 U. S. 466); Nickel v. Cole * * * (256 U. S. 222).

The present tax is not laid on the donor, but on the beneficiary; the gift taxed is not one long since completed, but one which never passed to the beneficiaries beyond recall until the death of the donor. * * * So long as the privilege of succession has not been fully exercised it may be reached by the tax." Saltonstall v. Saltonstall, 276 U. S. 260, 269, 270, 271, affirming Saltonstall v. Treasurer & Receiver General, 256 Mass. 519, where earlier Massachusetts decisions are reviewed. Boston Safe Deposit & Trust Co. v. Commissioner of Corporations & Taxation, Mass. Adv. Sh. (1929) 1233, 1235.

The settlors by the deed of July, 1907, divested themselves of all power of disposition over the principal of the trust. It then passed irrevocably from their control. After that they possessed only rights to the income.

Thus they did not divest themselves of all interest in the property. They stripped themselves of those rights in April, 1917. That is not pertinent to the issues here involved because before that time the statute had been changed as to taxation of successions so as to include the kind of succession established by the deed of July, 1907. Confessedly at the time of the execution of the trust deed there was no statute exacting an excise on the transfer

of the property or on succession to it. This, however, in [fol. 26] our opinion is not a decisive factor. The present excise under the statute was levied on the succession, not on the transmission, of the trust fund.

As already pointed out succession is a quite different thing from transmission. It is manifest from the terms of the declaration of trust that the death of the survivor of the settlors was expressly fixed as the effective date of succession by the final beneficiaries to the enjoyment of the principal and income of the trust estate.

The excise statute here controlling and already quoted is designed to include within its sweep all methods of succession to property to take effect in possession on enjoyment after the death of the grantor or donor other than those made inter vivos for a bona fide consideration.

By express words it embraces succession created by deed. Whenever property is conveyed upon such limitation that it will vest in interest, possession or enjoyment by reason of the death of the grantor or donor, such succession falls within the descriptive words of the statute.

The succession to any of these attributes of property occurring as the result of the death of the grantor or donor constitutes the taxable commodity. Magee v. Commissioner of Corporations & Taxation, 256 Mass. 512, 515.

The assignment of their life interest in the income of the trust by the settlors to their sons in 1917 did not operate to alter the nature of the trust instrument or of the transaction out of which spring the rights of the final beneficiaries. It is obvious that this assignment did not, even in combination with the trust instrument of July, 1907, vest the entire interest in the trust in the five sons.

That was recognized by the position of the trustees, set- [fol. 27] tlors and sons in Coolidge v. Loring, 235 Mass. 220, 222, where reformation of the trust instrument of July, 1907, was sought, because the demand on the trustees by the sons after the assignment for immediate distribution of the fund had been refused by reason of the "possible claim of a contingent interest on behalf of wives and children of sons pre-deceasing" the settlors. If no ultimate succession had been contemplated under the trust instrument of July, 1907, the assignment to the sons of the life interests of the settlors would have vested in the sons such complete

interest in the trust fund that they would have been in effect absolute owners of it, and it might have been reasonable and just that they should have had the control and disposal of it, unless some good cause appeared to the contrary. Sears v. Hardy, 120 Mass. 524. Sears v. Choate, 146 Mass. 395, 398. Claflin v. Claflin, 149 Mass. 19, 22. Langley v. Conlan, 212 Mass. 135, 138. See Forbes v. Snow, 245 Mass. 85, 93, and Abbott v. Williams, Mass. Adv. Sh. (1929) 1667, 1669. But manifestly the trust could not then terminate, because the succession could not take place or be ascertained until the death of the survivor of the settlors.

It is not necessary to the validity of the excise on succession that an interest in the property pass directly from the grantor or settlor at the time of his death. Boston Safe Deposit & Trust Co. v. Commissioner of Corporations & Taxation, Mass. Adv. Sh. (1929) 1233, 1237. If the beneficiary under the instrument of gift succeeds to an interest in the property not previously enjoyed, which bears a distinct and necessary relation to the death of the grantor or settlor, that is a succession subjected to the excise by the terms of the statute.

Plainly under the deed of July, 1907, the ultimate beneficiaries could not be determined with certainty until the death of both settlors.

[fol. 28] However unlikely, it nevertheless was possible that all or any number less than all of the five sons might predecease the survivor of the settlors. Which ones, if any of them, might so predecease could not be known until both settlors had died. No possession, enjoyment or title to the trust would ultimately vest in any son so predeceased or in his estate.

The interest of the sons surviving the settlors in the trust fund did not pass to them finally and irrevocably until and because of the death of both settlors. The property conveyed to the trustees by the deed of trust was so limited that it vested in the sons who should survive both settlors in interest, possession and enjoyment only by reason of and upon the death of the survivor of the settlors. This succession falls within the descriptive words of the statute. The five sons of the settlors, who have become the ultimate beneficiaries of the trust, had no power of control

individually or collectively over the trust fund while either of the settlors continued to live. They had no possession of it. That was vested exclusively in the trustees. They had no enjoyment of the trust fund, except as a vision of the future. They had no power of disposal of the whole or any part of the corpus of the trust estate. That power was enjoyed by the trustees alone. The extent of their interest was, at most, a remainder subject to be divested upon a condition subsequent with a limitation over upon the happening of that contingency. Clarke v. Fay, 205 Mass. 228, where cases are collected and reviewed. Blanchard v. Blanchard, 1 Allen, 223, 226. The nature of their interest might be the subject of assignment. Other interests of which the assignor has no possession or enjoyment may be assigned.

Citizens Loan Association v. Boston & Maine Railroad, 196 Mass. 528, 530, 531. Taylor v. Barton Child Co. 228 Mass. [fol. 29] 126, 130. Such rights are potential only and not vested in possession and enjoyment.

Under the deed of trust while either settlor lived the sons had no unrestricted right to receive and to use the proceeds of the property such as came to them upon the death of the last surviving settlor.

It is that succession to unrestricted and absolute title, in place of no possession or enjoyment whatever and a contingency as to title, which is made subject to the excise under the statute. The acquisition of the rights which accrued to the five sons on the death of the last settlor was a fundamental change in the nature of their relation to and interest in the trust.

It replaced a contingency with a certainty. Full title, complete and unrestricted in every particular, did not vest in them until that event. By that event the actual transfer of the possession of the trust fund passed under the terms of the deed of July, 1907, from the trustees to the five sons and the full enjoyment thereof as to title and income for the first time became theirs. It seems to us that this change constituted a succession. The excise is not levied on mere enjoyment, possession or ownership: it is levied upon the assured and completed ripening of a more or less tenuous, dubious and immature right into actual possession, irrevocable enjoyment and full title. We think that this

constituted a succession which lawfully might be made subject to the excise by a statute enacted and effective before such succession took place.

This is the inevitable result of our own decisions. Numerous excerpts from opinions written by judges eminent for learning and wisdom leading to that conclusion are collected in Magee v. Commissioner of Corporations & Taxation, 256 Mass. 512, 515, 516, and in Saltonstall v. Treasurer & Receiver General, 256 Mass. 519, 523, 524. It seems unnecessary to repeat them. They are referred to [fol. 30] as in part the basis of this decision. In discussion as to the nature of succession and the accrual of rights made subject to the excise upon succession, it was said in State Street Trust Co. v. Treasurer & Receiver General, 209 Mass. 373, at page 378: "The test * * * by which * * * exemption (from the excise) is to be ascertained does not depend upon whether a power to revoke has or has not been inserted, but upon the passing of the property with all the attributes of ownership independently of the death of the transferror. It is the absence of the power of control with the unrestricted right of the recipient to dispose of the property and to receive and use the proceeds, which by the express language of the statute subjects it to the tax * * * the intention of the settlor is plain, that the principal, even if it vested in title, was not to vest in possession and enjoyment during her life."

The test thus stated supports the excise here assailed. Although the facts in the case at bar differ in some particulars from those in Saltonstall v. Saltonstall, 276 U. S. 260, we think that that decision supports the conclusion that these excises might lawfully be levied.

The principle that no law is to be construed as operating retro-actively unless imperatively required by the words of the statute is recognized. Hanscom v. Malden & Melrose Gas Light Co., 220 Mass. 1, where cases are reviewed. Fullerton-Krueger Lumber Co. v. Northern Pacific Railway, 266 U. S. 435, 437. That principle is not here applicable because the succession, which is the subject of the excise, was not fully accomplished until after the enactment of the governing statute. Tax laws are to be strictly construed and every doubt resolved in favor of the taxpayer. Eaton, Crane & Pike Co. v. Commonwealth, 237

Mass. 523. The words of the already quoted statutes, con- [fol. 31] strued according to the natural and approved usage of the language, plainly include within their ambit such a succession as here has been taxed. "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." United States v. Jin Fuey Moy, 241 U. S. 394, 401. Kennedy v. Commissioner of Corporations & Taxation, 256 Mass. 426, 430. The authorities already cited appear to us to establish the constitutionality of the statute under which this excise was laid. Giving full weight to all these principles, they do not militate against the constitutionality of the present statute and of the excise levied thereunder.

The succession, as here defined and made subject to the excise, has been recognized for many years as a commodity which rightly may be made subject to an excise. Minot v. Winthrop, 162 Mass. 113, 115-122. Callahan v. Woodbridge, 171 Mass. 595, 597. Crocker v. Shaw, 174 Mass. 266, 267. Minot v. Treasurer & Receiver General, 207 Mass. 588. Attorney General v. Stone, 209 Mass. 186. Burnham v. Treasurer & Receiver General, 212 Mass. 165. Clark v. Treasurer & Receiver General, 226 Mass. 301, 305. The element of succession being the taxable commodity does not deny to the petitioners the equal protection of the laws nor does it deprive them of property without due process of law. Cohen v. Brewster, 203 U. S. 543. Chanler v. Kelsey, 205 U. S. 466. Nickel v. Cole, 256 U. S. 222. Saltonstall v. Saltonstall, 276 U. S., 260.

The validity of the present statute under the Constitution of the United States and of this Commonwealth appears to us to be established by these and the other authorities already cited.

The case at bar is distinguishable from Shwab v. Doyle, 258 U. S. 529, Shukert v. Allen, 273 U. S. 545, Nichols v. [fol. 32] Coolidge, 274 U. S. 531, Reinecke v. Northern Trust Co. 278 U. S. 339, 345, 347, and Chase National Bank v. United States, 278 U. S. 327. In each of those cases the tax under consideration was the Federal estate tax levied upon the property of the deceased transmitted at his death. That is a tax levied upon a subject quite different from the succession to property by a beneficiary, which is the subject of the present excise.

The case at bar is distinguishable from Dexter v. Treasurer & Receiver General, 243 Mass. 523, 525. In that case it was held that the "property" passed not upon the death of the donor but upon an outside event, and that "it did not pass by deed intended to take effect in possession or enjoyment after his death." The same in substance is true of People v. Northern Trust Co. 330 Ill. 238. The case at bar also is distinguishable from the points decided in First National Bank v. Commissioner of Corporations & Taxation, 258 Mass. 253.

It follows that each petition for abatement must be denied and decrees are to be entered to that effect.

Ordered accordingly.

Norfolk County:

A true copy of an attested true copy. Attest: James F. Reynolds, Assistant Register.

Certificate to foregoing paper omitted in printing.

[fol. 33] In Probate Court of Norfolk County

Final Decree

At a Probate Court holden at Dedham, in and for said County of Norfolk, on the 23rd day of December in the year of our Lord one thousand nine hundred and twenty-nine.

On the petition in equity of Harold J. Coolidge and Augustus P. Loring, trustees under a certain deed and declaration of trust (dated July 20, 1907) executed by J. Randolph Coolidge and Julia Coolidge for the benefit of J. Randolph Coolidge, Jr., and others, against Henry F. Long, Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts, respondent, praying that a certain inheritance tax referred to in said petition be abated, it appearing that notice according to the order of the Court was given the respondent, that the respondent, having been notified according to the order of the Court, duly appeared and answered, that the petition came on to be heard in this Court upon the pleadings and certain agreed facts, that the petitioners duly presented seven requests

for rulings of law, that the petition was thereupon reserved and reported for the determination of the Supreme Judicial Court, (said requests for rulings being embodied in the reservation and report), and that a rescript has been received from the Supreme Judicial Court, this Court, after hearing and consideration and in accordance with said rescript and with the opinion referred to therein, doth order and decree that said requests for rulings be and they hereby are severally denied and that said petition be and it hereby is dismissed.

Joseph R. McCoole, Judge of Probate Court.

[fol. 34] Dec. 6, 1929.

This decree is satisfactory in form to the respondent.

Henry F. Long, Commissioner, by Joseph E. Warner, Atty. Gen., by James S. Eastham, Asst. Atty. General.

Norfolk County:

A true copy. Attest: James F. Reynolds, Assistant Register.

[fol. 35] In Probate Court of Norfolk County

[Title omitted]

Petition for Appeal, Assignment of Errors, and Prayer for Reversal—Filed Dec. 23, 1929

Considering themselves aggrieved by the final decree entered in the above-entitled cause (pursuant to the decision and rescript of the Supreme Judicial Court of the Commonwealth of Massachusetts) by the Probate Court for the County of Norfolk in said Commonwealth under the docket number 67743 the petitioners therein, Harold J. Coolidge and Augustus P. Loring, trustees under a trust indenture (dated July 20, 1907) executed by J. Randolph Coolidge and Julia Coolidge for the benefit of J. Randolph Coolidge, Jr., and others, hereby pray that an appeal be allowed to the Supreme Court of the United States herein and that

there be entered an order fixing the amount of the bond on such appeal.

Said Harold J. Coolidge and Augustus P. Loring, trustees as aforesaid, assign the following errors in the record and proceedings herein:

1. Said Supreme Judicial Court erred in refusing to hold that Section 1 of Chapter 65 of the General Laws of Massachusetts (as construed by said court) is repugnant to Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of the contract embodied in said trust indenture.

[fol. 36] 2. Said Probate Court erred in denying the petitioners' request that it rule that, if said Section 1 purports to authorize the imposition of the tax now in question, it is repugnant to Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of the contract embodied in said trust indenture.

3. Said Supreme Judicial Court erred in refusing to hold that said Section 1 (as construed by said Court) is repugnant to Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of the contract embodied in the instrument dated April 6, 1917, whereby said J. Randolph Coolidge and Julia Coolidge assigned all their interest in the fund held in trust under said indenture to J. Randolph Coolidge, Jr., and others.

4. Said Probate Court erred in denying the petitioners' request that it rule that, if said Section 1 purports to authorize the imposition of the tax now in question, it is repugnant to Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of the contract embodied in the instrument dated April 6, 1917, whereby said J. Randolph Coolidge and Julia Coolidge assigned all their interest in the fund held in trust under said indenture to J. Randolph Coolidge, Jr., and others.

5. Said Supreme Judicial Court erred in refusing to hold that said Section I (as construed by said court) deprives the petitioners and those claiming under them of their property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

6. Said Probate Court erred in denying the petitioners' request that it rule that, if said Section 1 purports to au- [fol. 37] thorize the imposition of the tax now in question, it deprives the petitioners and those claiming under them of their property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

7. Said Supreme Judicial Court erred in refusing to hold that said Section 1 (as construed by said court) denies to the petitioners and those claiming under them the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

8. Said Probate Court erred in denying the petitioners' request that it rule that, if said Section 1 purports to authorize the imposition of the tax now in question, it denies to the petitioners and those claiming under them the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

9. Said Supreme Judicial Court erred in holding that the tax now in question was lawfully assessed and that the petitioners are not entitled to the abatement thereof.

10. Said Probate Court erred in denying the petitioners' prayer for abatement and in dismissing their petition.

For which errors said petitioners Harold J. Coolidge and Augustus P. Loring, trustees under said trust indenture, pray that the final decree of the Probate Court for the County of Norfolk in the Commonwealth of Massachusetts entered in the above-entitled cause on December 23, 1929, (pursuant to the decision and rescript of the Supreme Judicial Court of said Commonwealth) be reversed and a decree entered in favor of said petitioners and for their costs.

Storey, Thorndike, Palmer & Dodge, Solicitors for Appellants.

NORFOLK COUNTY:

A true copy. Attest: James F. Reynolds, Assistant Register. (Seal.)

[fol. 38] IN PROBATE COURT OF NORFOLK COUNTY

[Title omitted]

ORDER ALLOWING APPEAL—Filed Dec. 23, 1929

The appellants in the above-entitled suit and each of them having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the decree entered in the above-entitled suit by the Probate Court for the County of Norfolk in the Commonwealth of Massachusetts under the docket number 67743 on the twenty-third day of December 1929, and from each and every part thereof and having presented and filed their petition for appeal, assignment of errors and prayer for reversal pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided; it is hereby ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States from the Probate Court for the County of Norfolk and Commonwealth of Massachusetts in the above-entitled cause as provided by law and it is further ordered that the register of probate for said County of Norfolk shall prepare and certify a transcript of the record, proceedings and decree in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said court within thirty days of this date.

[fol. 39] And it is further ordered that security for costs on appeal be fixed in the sum of $100, for which sum a bond without surety is to be filed by the appellants.

Joseph R. McCoole, Judge of the Probate Court for the County of Norfolk, in the Commonwealth of Massachusetts.

NORFOLK COUNTY:

A true copy. Attest: James F. Reynolds, Assistant Register. (Seal.)

[fols. 40 & 41] Bond on appeal for $100.00 approved and filed December 23, 1929, omitted in printing.

[fols. 42 & 43] Citation, in usual form, showing service on Joseph E. Warner, omitted in printing.

[fol. 44] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT ENTIRE RECORD—Filed Jan. 18, 1930

The appellants adopt their assignments of error as their statement of the points to be relied upon and represent that the whole of the record as filed (other than the bond on appeal) is necessary for the consideration of the case.

Robert G. Dodge, Counsel for Appellants.

Boston, Mass., January 16, 1930.

Due and sufficient service of the foregoing statement and designation is hereby acknowledged.

Joseph E. Warner, Attorney General of Massachusetts, by R. Ammi Cutter, Assistant Attorney General of Massachusetts.

[fol. 45] [File endorsement omitted.]

Endorsed on cover: File No. 34,715. Massachusetts, Probate Court for the County of Norfolk. Term No. 584. Harold J. Coolidge and Augustus P. Loring, trustees, appellants, vs. Henry F. Long, Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts. Filed January 18, 1930. File No. 34,715.

FILE COPY

Office Supreme Court, U. S.
FILED
FEB 3 1930
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1929.

No. 33

HAROLD J. COOLIDGE AND AUGUSTUS P. LORING, TRUSTEES, *Appellants*,

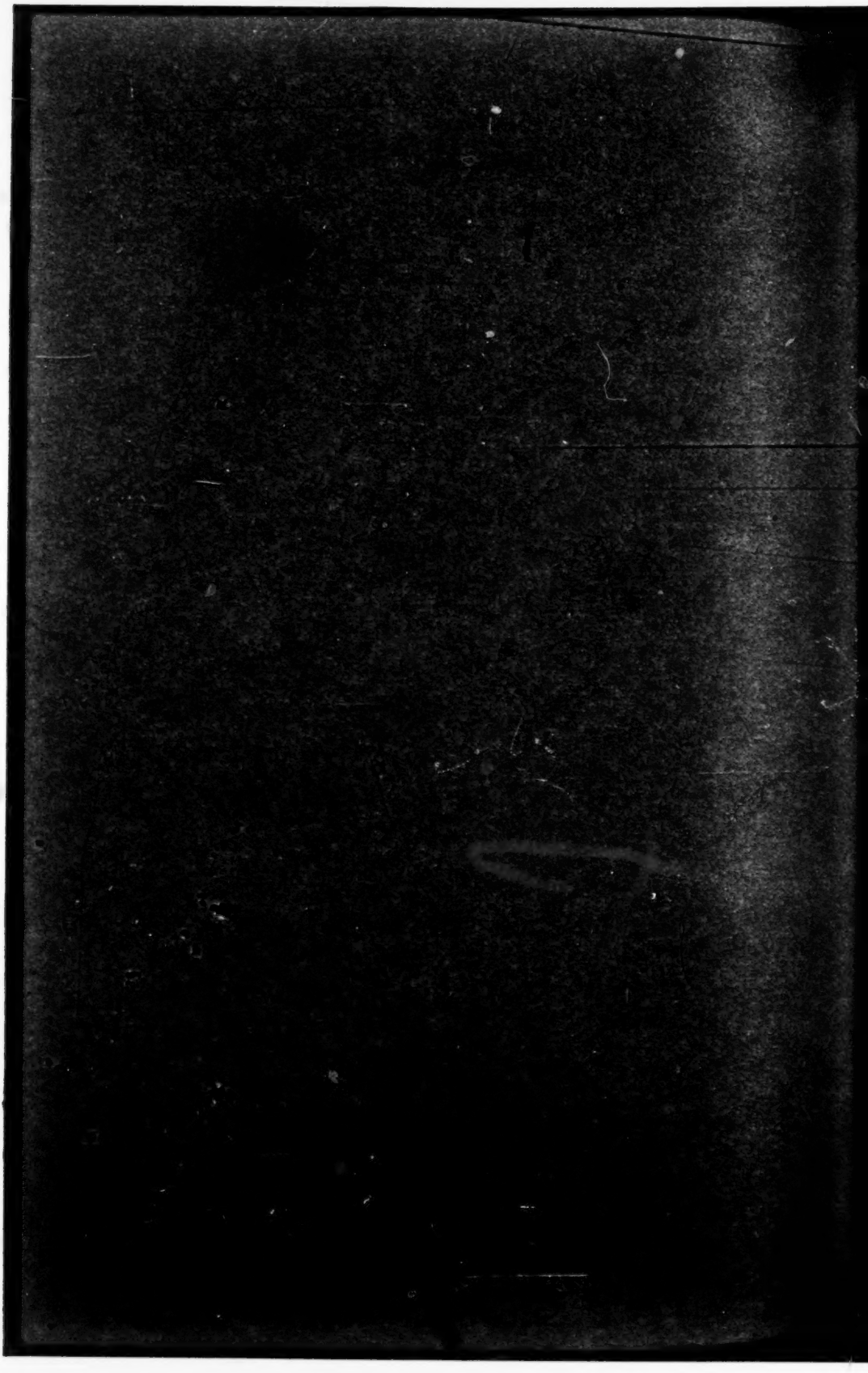
v.

HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS.

STATEMENT AS TO JURISDICTION ON APPEAL.

ROBERT G. DODGE,
Counsel for Appellants.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.



Supreme Court of the United States.

OCTOBER TERM, 1929.

No. 583.

HAROLD J. COOLIDGE AND AUGUSTUS P. LORING, TRUSTEES, *Appellants*,

v.

HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS.

STATEMENT AS TO JURISDICTION ON APPEAL.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:—

The appellants in support of the jurisdiction of this Court to review the above-entitled cause on appeal respectfully represent as follows:—

I.

STATUTORY PROVISION SUSTAINING JURISDICTION.

Section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 937 (U. S. C. Title 28, §343), is as follows:—

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution,

> treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

Pursuant to the Act of January 31, 1928 (45 Stat. 54), as amended by the Act of April 26, 1928 (45 Stat. 466), the present appeal is brought in lieu of a writ of error.

II.

Date of Decree and Date of Application for Appeal.

The decree sought to be reviewed was entered on December 23, 1929 (R. 33).*

On the same day the application for appeal (R. 35) was presented (R. 37) and allowed (R. 38-39), the bond approved (R. 40-41) and the citation issued (R. 42).

The opinion of the Supreme Judicial Court of Massachusetts (R. 22) referred to below is not yet officially reported, but has been printed in Mass. Adv. Sh. [1929] 1831 and in 167 N. E. Rep. 757.

III.

Nature of the Case and Rulings below.

This is a proceeding for the abatement of an inheritance tax assessed by the respondent in his capacity of Commissioner of Corporations and Taxation of the Common-

* All references to the record are to the pages of the certified unprinted record prepared by the Register of Probate for the County of Norfolk in the Commonwealth of Massachusetts and on file with the Clerk of this Court. The record has not yet been printed.

wealth of Massachusetts upon the estate of Julia Coolidge, late of Brookline, Massachusetts, under color of Section 1 of Chapter 65 of the General Laws of Massachusetts, the material part of which (as originally enacted) is as follows:—

> "All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of the commonwealth or not, which shall pass by will, or by laws regulating intestate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made in contemplation of the death of the grantor or donor or made or intended to take effect in possession or enjoyment after his death, and any beneficial interest therein which shall arise or accrue by survivorship in any form of joint ownership in which the decedent joint owner contributed during his life any part of the property held in such joint ownership or of the purchase price thereof, to any person, absolutely or in trust, except to or for the use of charitable, educational or religious societies or institutions, the property of which is by the laws of the commonwealth exempt from taxation, or for or upon trust for any charitable purposes to be carried out within the commonwealth, or to or for the use of the commonwealth or any town therein for public purposes, shall be subject to a tax at [specified rates]."

The various amendments to this section (the last of which was made by Acts of 1929, c. 292, §1) need not be recited, as these amendments deal only with the application of the statute to the property of non-residents or with other matters not important for the present purpose.

The proceeding was begun by a petition filed by the present appellants in the Probate Court for the County of Nor-

folk (R. 1, 3) pursuant to Section 27 of Chapter 65 of the General Laws of Massachusetts, which, as amended by Section 18 of Chapter 520 of the Acts of 1922, is as follows:—

> "The Commissioner shall determine the amount of tax due and payable upon any estate or part thereof, and shall certify the amount so due and payable to the persons by whom the tax is payable; but in the determination of the amount of any tax under this chapter the commissioner shall not be required to consider any payments on account of debts or expenses of administration which have not been allowed by the probate court having jurisdiction of said estate. Payment of the amount so certified shall be a discharge of the tax. An executor, administrator, trustee, grantee, donee or survivor aggrieved by any determination of the commissioner may, within one year after the payment of any such tax, apply by a petition in equity to the probate court having jurisdiction of the estate of the decedent for the abatement of the tax or any part thereof, and if the court adjudges that the tax or any part thereof was wrongly exacted it shall order an abatement of such part thereof as was assessed without authority of law. Upon a final decision ordering an abatement of any part of such a tax, the treasurer shall pay the amount adjudged to have been illegally exacted, with interest, without any further act or resolve making appropriation therefor."

The facts which appeared at the hearing in the Probate Court are summarized as follows in the opinion of the Supreme Judicial Court (R. 22) hereinafter referred to:—

> "The petitioners are trustees under a deed and declaration of trust executed on July 29, 1907, by J. Randolph Coolidge and Julia Coolidge and the petitioners. By that deed a large amount of real and personal estate was

transferred to the trustees by the settlors voluntarily and not as a bona fide purchase for full consideration in money or in money's worth. The trustees were given extensive powers of management, investment and reinvestment with the right to determine finally what receipts and payments should be credited to income or principal. The part of the trust fund furnished by J. Randolph Coolidge was four sevenths, and the part furnished by Julia Coolidge was three sevenths. By the terms of the trust the income was to be paid in these proportions to each of the settlors during their joint lives and then the entire income to the survivor, and, upon the death of the survivor, the principal was to be divided equally among their five sons, provided that, if any of the sons should predecease the survivor of the settlors, his share should go to those entitled to take his intestate property under the statute of distributions in force at the death of such survivor, with a further provision to the effect that in no event should a widow of such deceased son take as distributee more than half of such share. There was in the declaration of trust no power of revocation or modification or termination prior to the death of the survivor of the settlors. *Coolidge* v. *Loring*, 235 Mass. 220. By instrument executed on April 6, 1917, the settlors assigned their interest in the trust to the five sons, all of whom eventually survived the termination of the trust. Julia Coolidge died in January, 1921, and J. Randolph Coolidge on November 10, 1925, both being residents of this Commonwealth. The defendant determined that the petitioners were subject to excise taxes under G. L. c. 65, §1, as amended, upon the four sevenths and upon the three sevenths of the trust estate furnished respectively by each settlor as of November 10, 1925. There is no controversy as to the amount of the excise if any is due.

"When the declaration of trust was executed, no statute was operative under which the trust property could have been subjected to an excise because the succession was to direct descendants of the settlors. Statutes then in force provided for levy of an excise only where the succession was to collateral relatives and to strangers."

As pointed out in the opinion (R. 23) the first Massachusetts statute purporting to impose a tax with respect to the passing of property to direct descendants was Chapter 563 of the Acts of 1907, which took effect on September 1, 1907, and upon which Section 1 of Chapter 65 of the General Laws is founded.

The petitioners (now appellants) requested the Probate Court to rule (a) that the statute under color of which the tax in question was assessed did not according to its true construction authorize the imposition of such tax, (b) that the statute, if construed as authorizing the imposition of the tax, was repugnant to the Constitution of Massachusetts and (c) that the statute, if so construed, was repugnant to the Constitution of the United States. The rulings requested with respect to this last point were as follows (R. 18-19):—

"4. If G. L. c. 65, §1, purports to authorize the imposition of the tax now in question, it is repugnant to Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of the contract embodied in the trust indenture of July 29, 1907.

"5. If G. L. c. 65, §1, purports to authorize the imposition of the tax now in question, it is repugnant to Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of the contract embodied in the assignment of April 6, 1917.

"6. If G. L. c. 65, §1, purports to authorize the imposition of the tax now in question, it deprives the peti-

tioners and those claiming under them of their property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

"7. If G. L. c. 65, §1, purports to authorize the imposition of the tax now in question, it denies to the petitioners and those claiming under them the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States."

The Probate Court, without making any decision, reserved all questions of law presented by the case for the determination of the Supreme Judicial Court, which is the highest court of the Commonwealth of Massachusetts. This procedure was in accordance with Sections 9 and 13 of Chapter 215 of the General Laws of Massachusetts, the material parts of these sections being as follows:—

"SECTION 9. A person aggrieved by an order, decree or denial of a probate court made after this chapter takes effect, may, within twenty days after the entry thereof, appeal from the same to the supreme judicial court, and the appeal shall be heard and determined by the full court, which shall have like powers and authority in respect thereto as upon an appeal in a suit in equity under the general equity jurisdiction."

* * * * * * * * * *

"SECTION 13. A judge of the probate court by whom a case or matter is heard for final determination may reserve and report the evidence and all questions of law therein for consideration of the full court, and thereupon like proceedings shall be had as upon appeal."

The petitioners' requests for rulings were embodied in the reservation (R. 18). The Supreme Judicial Court sent down a rescript (R. 20) directing that the petition be dis-

missed and incorporating by reference an opinion (R. 22-32) in which it was held in substance that none of the petitioners' contentions were well founded and that the tax was lawfully assessed; after examining many authorities, including various decisions of this court, it was stated that "the validity of the present statute under the Constitution of the United States and of this Commonwealth appears to us to be established by these and the other authorities already cited." The Probate Court thereupon entered a final decree denying each of the petitioners' requests for rulings and dismissing the petition (R. 33). Under the Massachusetts practice the decree so entered constitutes the final decision of the highest court of the State in which a decision could be had, so that the appeal is taken directly from that decree.

Davis v. *L. L. Cohen & Co., Inc.*, 268 U. S. 638.

The procedure has been the same in all substantial particulars as that in *Ex parte Worcester County National Bank*, 279 U. S. 347, which came to this court by appeal from a decree of the Probate Court for Worcester County, Massachusetts.

IV.

Cases believed to sustain Jurisdiction.

The decision of this Court in *Saltonstall* v. *Saltonstall*, 276 U. S. 260, involved the constitutionality of the statute now under consideration as applied to a different trust and is directly in point on the question of jurisdiction. Of the many cases similar in principle the following may be referred to:—

Safe Deposit & Trust Co. v. *Virginia*, 280 U. S. 83.

Macallen Co. v. *Massachusetts*, 279 U. S. 620.

Louisville Gas & Electric Co. v. *Coleman*, 277 U. S. 31.

Schlesinger v. *Wisconsin*, 270 U. S. 230.
Rhode Island Trust Co. v. *Doughton*, 270 U. S. 69.
Frick v. *Pennsylvania*, 268 U. S. 473.
Alpha Portland Cement Co. v. *Massachusetts*, 268 U. S. 203.

In *Nichols* v. *Coolidge*, 274 U. S. 531, Section 402 (c) of the Revenue Act of 1918 was held unconstitutional as applied to the trust now in question.

The appellants therefore submit that this Court has jurisdiction of their appeal by virtue of Section 237 (a) of the Judicial Code as amended by the Act of February 13, 1925.

ROBERT G. DODGE,
Counsel for Appellants.

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Supreme Court of the United States.

OCTOBER TERM, 1929.

No. 34

HAROLD J. COOLIDGE AND AUGUSTUS P. LORING, TRUSTEES, *Appellants*,

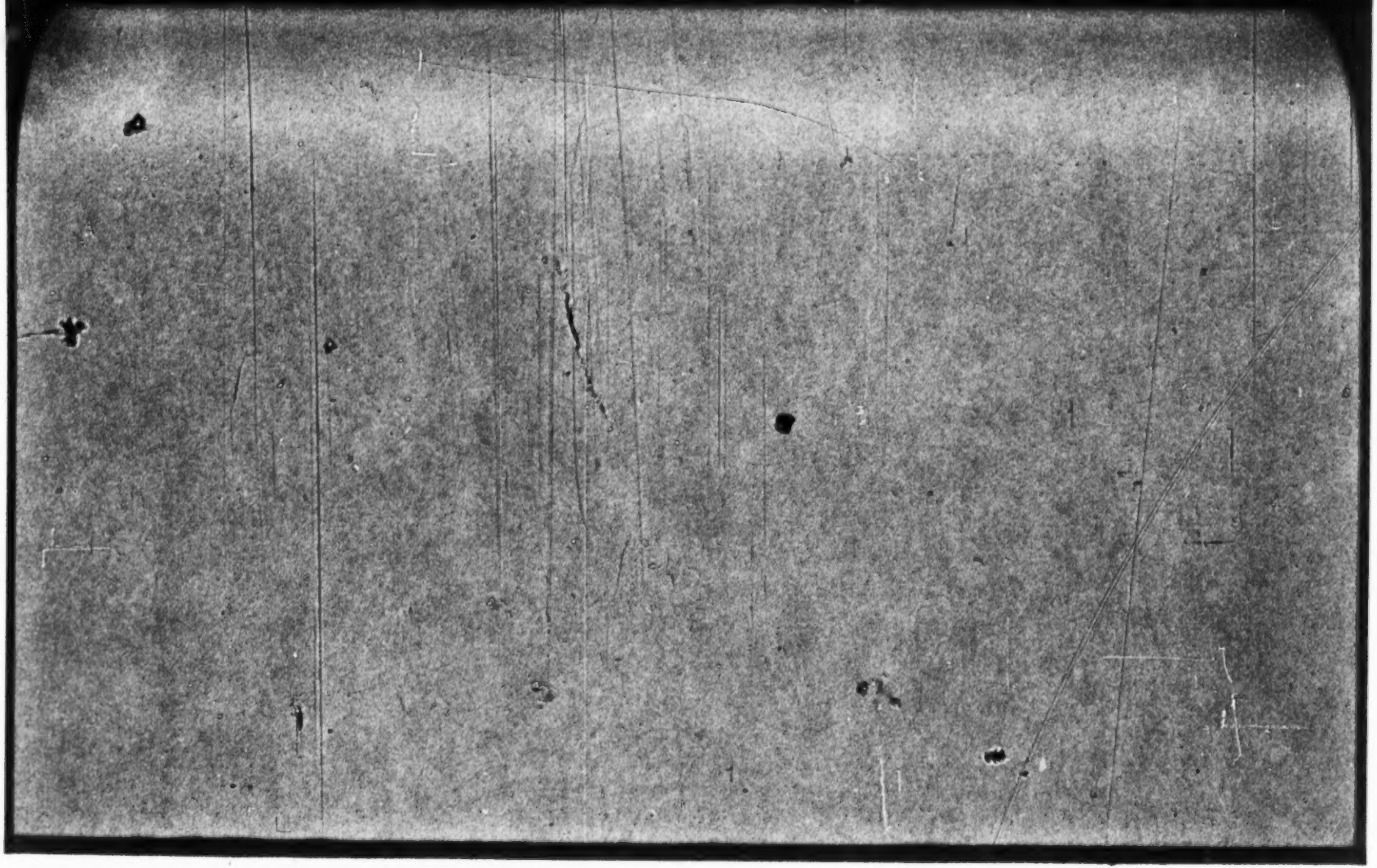
v.

HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS.

STATEMENT AS TO JURISDICTION ON APPEAL.

ROBERT G. DODGE,
Counsel for Appellants.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.



Supreme Court of the United States.

OCTOBER TERM, 1929.

No. 584.

HAROLD J. COOLIDGE AND AUGUSTUS P. LORING, TRUSTEES, *Appellants*,

v.

HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS.

STATEMENT AS TO JURISDICTION ON APPEAL.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:—

The appellants in support of the jurisdiction of this Court to review the above-entitled cause on appeal respectfully represent as follows:—

I.

STATUTORY PROVISION SUSTAINING JURISDICTION.

Section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 937 (U. S. C. Title 28, §343), is as follows:—

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution,

treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

Pursuant to the Act of January 31, 1928 (45 Stat. 54), as amended by the Act of April 26, 1928 (45 Stat. 466), the present appeal is brought in lieu of a writ of error.

II.

Date of Decree and Date of Application for Appeal.

The decree sought to be reviewed was entered on December 23, 1929 (R. 33).*

On the same day the application for appeal (R. 35) was presented (R. 37) and allowed (R. 38-39), the bond approved (R. 40-41) and the citation issued (R. 42).

The opinion of the Supreme Judicial Court of Massachusetts (R. 22) referred to below is not yet officially reported, but has been printed in Mass. Adv. Sh. [1929] 1831 and in 167 N. E. Rep. 757.

III.

Nature of the Case and Rulings below.

This is a proceeding for the abatement of an inheritance tax assessed by the respondent in his capacity of Commissioner of Corporations and Taxation of the Common-

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wealth of Massachusetts upon the estate of J. Randolph Coolidge, late of Brookline, Massachusetts, under color of Section 1 of Chapter 65 of the General Laws of Massachusetts, the material part of which (as originally enacted) is as follows:—

> "All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of the commonwealth or not, which shall pass by will, or by laws regulating intestate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made in contemplation of the death of the grantor or donor or made or intended to take effect in possession or enjoyment after his death, and any beneficial interest therein which shall arise or accrue by survivorship in any form of joint ownership in which the decedent joint owner contributed during his life any part of the property held in such joint ownership or of the purchase price thereof, to any person, absolutely or in trust, except to or for the use of charitable, educational or religious societies or institutions, the property of which is by the laws of the commonwealth exempt from taxation, or for or upon trust for any charitable purposes to be carried out within the commonwealth, or to or for the use of the commonwealth or any town therein for public purposes, shall be subject to a tax at [specified rates]."

The various amendments to this section (the last of which was made by Acts of 1929, c. 292, §1) need not be recited, as these amendments deal only with the application of the statute to the property of non-residents or with other matters not important for the present purpose.

The proceeding was begun by a petition filed by the present appellants in the Probate Court for the County of Nor-

folk (R. 1, 3) pursuant to Section 27 of Chapter 65 of the General Laws of Massachusetts, which, as amended by Section 18 of Chapter 520 of the Acts of 1922, is as follows:—

> "The Commissioner shall determine the amount of tax due and payable upon any estate or part thereof, and shall certify the amount so due and payable to the persons by whom the tax is payable; but in the determination of the amount of any tax under this chapter the commissioner shall not be required to consider any payments on account of debts or expenses of administration which have not been allowed by the probate court having jurisdiction of said estate. Payment of the amount so certified shall be a discharge of the tax. An executor, administrator, trustee, grantee, donee or survivor aggrieved by any determination of the commissioner may, within one year after the payment of any such tax, apply by a petition in equity to the probate court having jurisdiction of the estate of the decedent for the abatement of the tax or any part thereof, and if the court adjudges that the tax or any part thereof was wrongly exacted it shall order an abatement of such part thereof as was assessed without authority of law. Upon a final decision ordering an abatement of any part of such a tax, the treasurer shall pay the amount adjudged to have been illegally exacted, with interest, without any further act or resolve making appropriation therefor."

The facts which appeared at the hearing in the Probate Court are summarized as follows in the opinion of the Supreme Judicial Court (R. 22) hereinafter referred to:—

> "The petitioners are trustees under a deed and declaration of trust executed on July 29, 1907, by J. Randolph Coolidge and Julia Coolidge and the petitioners. By that deed a large amount of real and personal estate was

transferred to the trustees by the settlors voluntarily and not as a bona fide purchase for full consideration in money or in money's worth. The trustees were given extensive powers of management, investment and reinvestment with the right to determine finally what receipts and payments should be credited to income or principal. The part of the trust fund furnished by J. Randolph Coolidge was four sevenths, and the part furnished by Julia Coolidge was three sevenths. By the terms of the trust the income was to be paid in these proportions to each of the settlors during their joint lives and then the entire income to the survivor, and, upon the death of the survivor, the principal was to be divided equally among their five sons, provided that, if any of the sons should predecease the survivor of the settlors, his share should go to those entitled to take his intestate property under the statute of distributions in force at the death of such survivor, with a further provision to the effect that in no event should a widow of such deceased son take as distributee more than half of such share. There was in the declaration of trust no power of revocation or modification or termination prior to the death of the survivor of the settlors. *Coolidge* v. *Loring,* 235 Mass. 220. By instrument executed on April 6, 1917, the settlors assigned their interest in the trust to the five sons, all of whom eventually survived the termination of the trust. Julia Coolidge died in January, 1921, and J. Randolph Coolidge on November 10, 1925, both being residents of this Commonwealth. The defendant determined that the petitioners were subject to excise taxes under G.-L. c. 65, §1, as amended, upon the four sevenths and upon the three sevenths of the trust estate furnished respectively by each settlor as of November 10, 1925. There is no controversy as to the amount of the excise if any is due.

> "When the declaration of trust was executed, no statute was operative under which the trust property could have been subjected to an excise because the succession was to direct descendants of the settlors. Statutes then in force provided for levy of an excise only where the succession was to collateral relatives and to strangers."

As pointed out in the opinion (R. 23) the first Massachusetts statute purporting to impose a tax with respect to the passing of property to direct descendants was Chapter 563 of the Acts of 1907, which took effect on September 1, 1907, and upon which Section 1 of Chapter 65 of the General Laws is founded.

The petitioners (now appellants) requested the Probate Court to rule (a) that the statute under color of which the tax in question was assessed did not according to its true construction authorize the imposition of such tax, (b) that the statute, if construed as authorizing the imposition of the tax, was repugnant to the Constitution of Massachusetts and (c) that the statute, if so construed, was repugnant to the Constitution of the United States. The rulings requested with respect to this last point were as follows (R. 18-19):—

> "4. If G. L. c. 65, §1, purports to authorize the imposition of the tax now in question, it is repugnant to Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of the contract embodied in the trust indenture of July 29, 1907.
>
> "5. If G. L. c. 65, §1, purports to authorize the imposition of the tax now in question, it is repugnant to Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of the contract embodied in the assignment of April 6, 1917.
>
> "6. If G. L. c. 65, §1, purports to authorize the imposition of the tax now in question, it deprives the peti-

tioners and those claiming under them of their property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

"7. If G. L. c. 65, §1, purports to authorize the imposition of the tax now in question, it denies to the petitioners and those claiming under them the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States."

The Probate Court, without making any decision, reserved all questions of law presented by the case for the determination of the Supreme Judicial Court, which is the highest court of the Commonwealth of Massachusetts. This procedure was in accordance with Sections 9 and 13 of Chapter 215 of the General Laws of Massachusetts, the material parts of these sections being as follows:—

"SECTION 9. A person aggrieved by an order, decree or denial of a probate court made after this chapter takes effect, may, within twenty days after the entry thereof, appeal from the same to the supreme judicial court, and the appeal shall be heard and determined by the full court, which shall have like powers and authority in respect thereto as upon an appeal in a suit in equity under the general equity jurisdiction."

* * * * * * * * *

"SECTION 13. A judge of the probate court by whom a case or matter is heard for final determination may reserve and report the evidence and all questions of law therein for consideration of the full court, and thereupon like proceedings shall be had as upon appeal."

The petitioners' requests for rulings were embodied in the reservation (R. 18). The Supreme Judicial Court sent down a rescript (R. 20) directing that the petition be dis-

missed and incorporating by reference an opinion (R. 22-32) in which it was held in substance that none of the petitioners' contentions were well founded and that the tax was lawfully assessed; after examining many authorities, including various decisions of this court, it was stated that "the validity of the present statute under the Constitution of the United States and of this Commonwealth appears to us to be established by these and the other authorities already cited." The Probate Court thereupon entered a final decree denying each of the petitioners' requests for rulings and dismissing the petition (R. 33). Under the Massachusetts practice the decree so entered constitutes the final decision of the highest court of the State in which a decision could be had, so that the appeal is taken directly from that decree.

Davis v. *L. L. Cohen & Co., Inc.*, 268 U. S. 638.

The procedure has been the same in all substantial particulars as that in *Ex parte Worcester County National Bank*, 279 U. S. 347, which came to this court by appeal from a decree of the Probate Court for Worcester County, Massachusetts.

IV.

Cases believed to sustain Jurisdiction.

The decision of this Court in *Saltonstall* v. *Saltonstall*, 276 U. S. 260, involved the constitutionality of the statute now under consideration as applied to a different trust and is directly in point on the question of jurisdiction. Of the many cases similar in principle the following may be referred to:—

Safe Deposit & Trust Co. v. *Virginia*, 280 U. S. 83.

Macallen Co. v. *Massachusetts*, 279 U. S. 620.

Louisville Gas & Electric Co. v. *Coleman*, 277 U. S. 31.

Schlesinger v. *Wisconsin*, 270 U. S. 230.
Rhode Island Trust Co. v. *Doughton*, 270 U. S. 69.
Frick v. *Pennsylvania*, 268 U. S. 473.
Alpha Portland Cement Co. v. *Massachusetts*, 268 U. S. 203.

In *Nichols* v. *Coolidge*, 274 U. S. 531, Section 402 (c) of the Revenue Act of 1918 was held unconstitutional as applied to the trust now in question.

The appellants therefore submit that this Court has jurisdiction of their appeal by virtue of Section 237 (a) of the Judicial Code as amended by the Act of February 13, 1925.

ROBERT G. DODGE,
Counsel for Appellants.

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Supreme Court of the United States.

October Term, 1930.

No. 33.

HAROLD J. COOLIDGE and AUGUSTUS P. LORING,
TRUSTEES, APPELLANTS,

v.

HENRY F. LONG, Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts.

No. 34.

SAME v. SAME.

BRIEF FOR THE APPELLANTS.

ROBERT G. DODGE.
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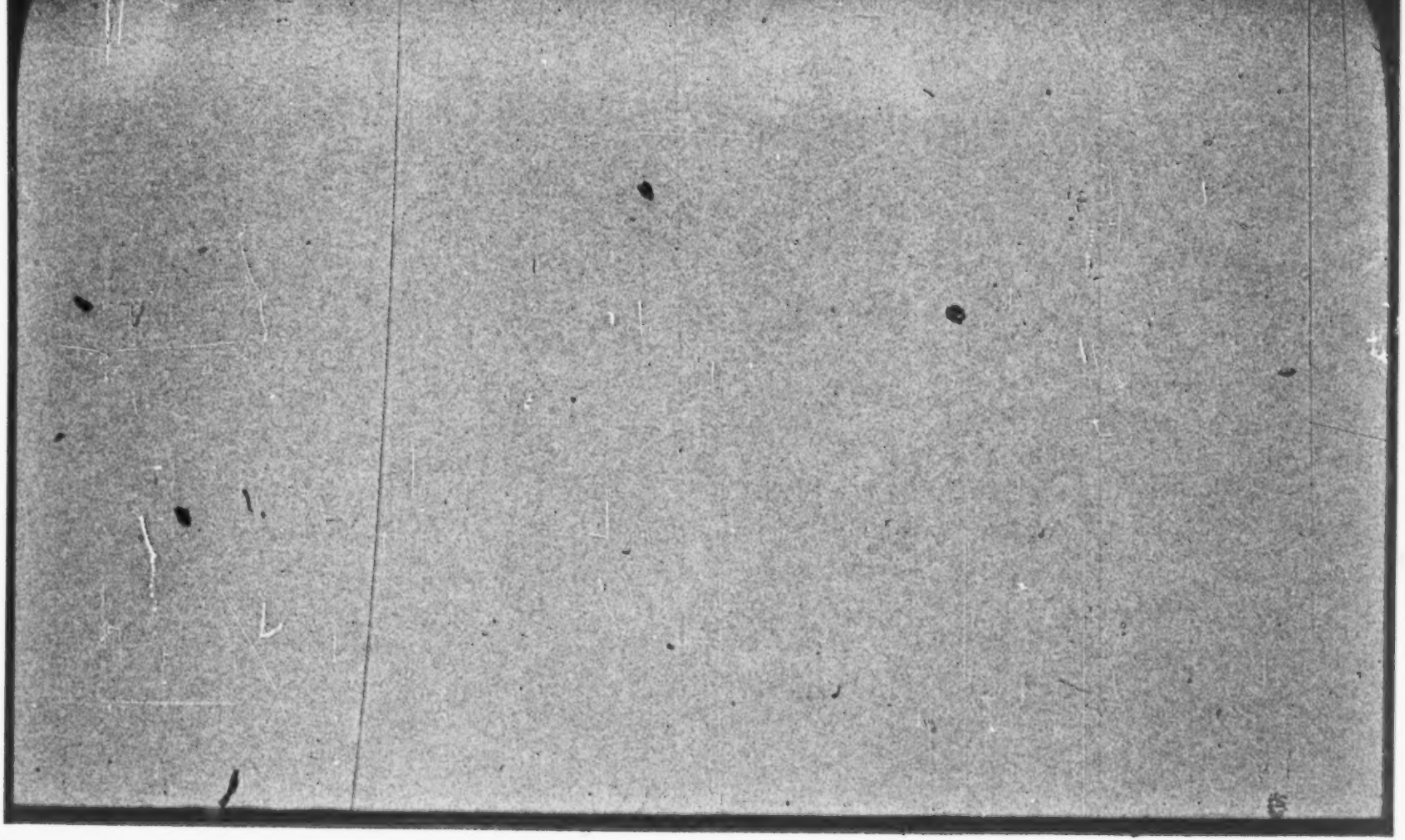

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Supreme Court of the United States.

OCTOBER TERM, 1930.

[No. 33]

HAROLD J. COOLIDGE AND AUGUSTUS P. LORING,
TRUSTEES, APPELLANTS,
v.
HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS.

[No. 34]

SAME *v.* SAME.

BRIEF FOR THE APPELLANTS.

The appellants in both the present cases are the trustees under a deed executed by J. Randolph Coolidge and Julia Coolidge, his wife, both of Brookline, Norfolk County, Massachusetts. The first case relates to an inheritance tax assessed under color of Section 1 of Chapter 65 of the General Laws of Massachusetts upon that part of the trust property furnished by Julia Coolidge. The second case concerns a similar tax assessed upon the part furnished by J. Randolph Coolidge. The questions involved in the two cases are in all respects the same. The respective records are complete in themselves, but are practically identical; references in this brief to the pages of the "record" will, there-

fore, be understood as relating to the designated pages in each record. In the course of printing the records the respective petitions by which the two cases were begun in the Probate Court for Norfolk County, Massachusetts, have been transposed, so that the petition relating to the tax upon the property furnished by Julia Coolidge appears on page 2 of the record in the second case and *vice versa*. This misplacement has been corrected by a stipulation filed with the clerk of this court. The original petition in each case was, moreover, superseded by an amended petition upon which the case was heard and determined. These amended petitions appear in their proper places on page 3 of the respective records.

The Opinion of the Court Below.

The opinion of the Supreme Judicial Court (R. 14) is not yet officially reported, but has been printed in Mass. Adv. Sh. [1929] 1831 and in 167 N.E. Rep. 757.

The Jurisdiction of this Court.

The petitioners requested the state courts to rule that, if the statute under color of which the taxes in question were assessed authorized the imposition of these taxes, it was repugnant to various provisions of the Constitution of the United States (R. 13). By the final decrees all these requests were denied (R. 24). On March 10, 1930, this court made a finding of probable jurisdiction in each case.

Statement of the Cases.

The present proceedings were begun pursuant to Section 27 of Chapter 65 of the General Laws of Massachusetts, which, as amended by Section 18 of Chapter 520 of the Acts of 1922, provides in substance that all succession taxes shall be assessed by the Commissioner of Corporations and Tax-

ation and that a person aggrieved by any determination of the Commissioner may within one year after the payment of the tax apply by a petition in equity to the Probate Court having jurisdiction of the decedent's estate for the abatement of the tax. The facts which appeared at the hearing in the Probate Court are stated as follows in the opinion of the Supreme Judicial Court (R. 14-15):—

> "The petitioners are trustees under a deed and declaration of trust executed on July 29, 1907, by J. Randolph Coolidge and Julia Coolidge and the petitioners. By that deed a large amount of real and personal estate was transferred to the trustees by the settlors voluntarily and not as a bona fide purchase for full consideration in money or in money's worth. The trustees were given extensive powers of management, investment and re-investment with the right to determine finally what receipts and payments should be credited to income or principal. The part of the trust fund furnished by J. Randolph Coolidge was four sevenths, and the part furnished by Julia Coolidge was three sevenths. By the terms of the trust the income was to be paid in these proportions to each of the settlors during their joint lives and then the entire income to the survivor, and, upon the death of the survivor, the principal was to be divided equally among their five sons, provided that, if any of the sons should predecease the survivor of the settlors, his share should go to those entitled to take his intestate property under the statute of distributions in force at the death of such survivor, with a further provision to the effect that in no event should a widow of such deceased son take as distributee more than half of such share. There was in the declaration of trust no power of revocation or modification or termination prior to the death of the survivor of the settlors. *Coolidge* v. *Loring*, 235 Mass. 220. By instrument executed on April 6, 1917, the settlors assigned their interest in

the trust to the five sons, all of whom eventually survived the termination of the trust. Julia Coolidge died in January, 1921, and J. Randolph Coolidge on November 10, 1925, both being residents of this Commonwealth. The defendant determined that the petitioners were subject to excise taxes under G. L. c. 65, §1, as amended, upon the four sevenths and upon the three sevenths of the trust estate furnished respectively by each settlor as of November 10, 1925. There is no controversy as to the amount of the excise if any is due."

The pertinent statutes are summarized by the Supreme Judicial Court as follows (R. 15-17):—

"When the declaration of trust was executed, no statute was operative under which the trust property could have been subjected to an excise because the succession was to direct descendants of the settlors. Statutes then in force provided for levy of an excise only where the succession was to collateral relatives and to strangers. There had been approved on June 27, St. 1907, c. 563, which took effect on September 1, 1907, about five weeks after the date of the declaration of trust. This is the first relevant statute. Its provisions were: §1. 'All property within the jurisdiction of the Commonwealth . . . which shall pass by . . . deed, grant, or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person . . . shall be subject to a tax. . . .' §25. 'This act shall not apply to estates of persons deceased prior to the date when it takes effect, or to property passing by deed, grant, sale, or gift made prior to said date. . . .' Said §1 was amended in particulars not here material by St. 1912, c. 678, §1. It was provided by §3 of the latter statute: 'The provisions of section one of this act

shall apply to the estates of all persons dying subsequent to the passage hereof, and to all property passing by deed, grant or gift except in cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor or donor, if such death occurs subsequent to the passage hereof. . . .' Said §25 was amended by St. 1914, c. 563, §1, so as to read: 'This part shall not apply to . . . property passing by deed, grant, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor when such death occurred prior to said date [September 1, 1907]. . . .' The relevant statutory provisions operative since January 1, 1921, are in G.L. c. 65, as follows: §1. 'All property within the jurisdiction of the commonwealth . . . which shall pass by . . . deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth . . . made or intended to take effect in possession or enjoyment after his death . . . to any person, absolutely or in trust . . . shall be subject to a tax . . .'; §36. 'This chapter shall apply only to property or interests therein passing or accruing upon the death of persons dying on or after May fourth, nineteen hundred and twenty. . . .'

"The question for decision is whether the net trust estate passing to the sons on the death of the surviving settlor is subject to excise taxes under these statutes."

The full text of the several statutes is given in the appendix to this brief.

The petitioners (now appellants) requested the Probate Court in each case to rule (*a*) that the statute under color of which the tax in question was assessed did not according to its true construction authorize the imposition of such a tax, (*b*) that the statute, if construed as authorizing the

imposition of the tax, was repugnant to the Constitution of Massachusetts and (c) that the statute, if so construed, was repugnant to the Constitution of the United States in the particulars specified in the fourth, fifth, sixth and seventh rulings thus requested. These rulings were as follows (R. 13):—

> "4. If G. L. c. 65, §1, purports to authorize the imposition of the tax now in question, it is repugnant to Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of the contract embodied in the trust indenture of July 29, 1907.
>
> "5. If G. L. c. 65, §1, purports to authorize the imposition of the tax now in question, it is repugnant to Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of the contract embodied in the assignment of April 6, 1917.
>
> "6. If G. L. c. 65, §1, purports to authorize the imposition of the tax now in question, it deprives the petitioners and those claiming under them of their property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.
>
> "7. If G. L. c. 65, §1, purports to authorize the imposition of the tax now in question, it denies to the petitioners and those claiming under them the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States."

The Probate Court, without making any decision, reserved all questions of law presented by the cases for the determination of the Supreme Judicial Court (R. 12). This procedure was in accordance with Sections 9 and 13 of Chapter 215 of the General Laws of Massachusetts, which are quoted in the appendix. The petitioners' requests for rulings were embodied in the reservations (R. 13). The Supreme Judicial Court sent down in each case a rescript

(R. 14) directing that the petition be dismissed and incorporating by reference the opinion referred to above (R. 14-23). In this opinion it was held in substance that none of the petitioners' contentions were well founded and that the tax was lawfully assessed; after examining many authorities, including various decisions of this court, it was stated that "the validity of the present statute under the Constitution of the United States and of this Commonwealth appears to us to be established by these and the other authorities already cited." The Probate Court thereupon entered in each case a final decree denying the petitioners' several requests for rulings and dismissing the petition (R. 23-24). Under the Massachusetts practice the decrees so entered constitute the final decisions of the highest court of the State in which decisions could be had, so that the appeals are taken directly from those decrees.

Davis v. *L. L. Cohen & Co., Inc.*, 268 U.S. 638.

Specification of Errors.

The appellants recognize that this court will not review the rulings of the state courts as to the construction of the statute or as to its conformity to the state constitution. They have, therefore, assigned errors only with respect to the refusal of those rulings which involve federal questions. The ten assignments of error, all of which are insisted upon (R. 24-25), present in different forms the contention that the statute as interpreted by the state courts is repugnant to the Constitution of the United States,—

(*a*) Because it deprives the appellants and those claiming under them of their property without due process of law and impairs the obligation of the contracts embodied in the deed of trust and in the assignment;

(*b*) Because it denies to the appellants and those claiming under them the equal protection of the laws.

ARGUMENT.

In *Nichols* v. *Coolidge*, 274 U.S. 531, § 402 (*c*) of the Revenue Act of 1918 was held unconstitutional as applied to the trust now in question. The Supreme Judicial Court refused to follow this decision on the ground that the tax imposed by the Revenue Act of 1918 is an estate tax, whereas the tax now in question is a succession tax. The appellants submit that, with reference to the particular facts now presented, this difference between the respective taxes is immaterial.

1. Since the grantors reserved no right to revoke or otherwise to affect the devolution of the trust property, the establishment of the trust was the only occasion with respect to which an excise might be imposed; the mere fact that some element of contingency affecting the rights of the other beneficiaries ceased after the statute took effect did not enable the State to impose a tax so long as these rights could not be divested by any act done by the grantors or by any one else after that date.

2. Upon the construction adopted by the state courts, the statute, as applied to trusts under which the settlor has no beneficial interest, makes an arbitrary discrimination between cases in which the death of the settlor is designated as the occasion upon which the rights of the beneficiaries are to be freed from possible divesting and those in which some other event is so designated.

I.

The Statute as construed by the Courts below is repugnant to the Due Process Clause of the Fourteenth Amendment and impairs the Obligation of the Contracts embodied in the Trust Deed and Assignment.

The relations of the statute to these two constitutional restrictions will be considered together, since the issues

arising under each of them are substantially the same. The fundamental question is whether rights had so vested prior to the imposition of the tax that there was thereafter no occasion with respect to which a tax might properly be imposed. In most of the cases cited below, the discussion has been as to whether the imposition of a tax under such circumstances deprives the taxpayer of his property without due process of law. In some of them, however, stress has been laid upon the effect of such a tax as impairing the obligation of contracts. If rights granted by a deed are so vested that interference with them impairs the obligation of the contract embodied in the deed, it necessarily follows that such interference deprives the grantee of his property without due process of law. The converse is equally true. In the following discussion, therefore, the appellants have not attempted to classify the cases according as they relate primarily to the due process clause or to the prohibition against impairing the obligation of contracts. If on any theory the rights of the beneficiaries were so vested that the State could not interfere with them, it follows that the appellants' 4th, 5th, 6th and 7th requests (R. 13) should have been given and that the statute, as applied to the present situation, cannot stand.

The Supreme Judicial Court (R. 17) states that the question for decision is whether the trust estate "is subject to excise taxes" under the statutes of Massachusetts. The respondent, it is understood, recognizes that, unless the tax can be sustained as an excise, it must fail altogether; if the statute were construed as imposing a property tax, it would be repugnant to the Constitution of Massachusetts.

Minot v. *Winthrop*, 162 Mass. 113.

The case, therefore, presents a situation which has arisen many times in different state courts and as to which the decisions, other than that now under review, are all to the

effect that the attempt to impose an excise constitutes an unwarranted interference with vested rights.

Hunt v. *Wicht*, 174 Cal. 205.
Lacey v. *State Treasurer*, 152 Iowa, 477.
State v. *Probate Court of Washington County*, 102 Minn. 268.
Matter of Pell, 171 N.Y. 48.
Matter of Craig, 97 App. Div. 289; affirmed 181 N.Y. 551.
Houston's Estate, 276 Penn. St. 330.
Commonwealth v. *Wellford*, 114 Va. 372.

As is pointed out in these cases, the vital question in such a situation is as to when the succession to the property takes place, because the succession is the subject of the tax. If the succession is complete before the tax law is enacted, the effect of the law, if construed as appiying to such a case, is to impose an excise with respect to a past transaction and this, it is very clear, cannot be done.

Untermyer v. *Anderson*, 276 U.S. 440.
Blodgett v. *Holden*, 275 U.S. 142.
Nichols v. *Coolidge*, 274 U.S. 531.

A comprehensive statement of the principle is found in the opinion of Mr. Justice Holmes in *Chanler* v. *Kelsey*, 205 U.S. 466 (at p. 480). The difference between his views and those of the majority was as to the application of the rule to the particular facts presented and not at all as to the rule itself.

> "If . . . a given state tax must be held to be a succession tax in order to maintain its validity, or if in fact it is held to be a succession tax by the state court of which it is the province to decide that matter, it follows that such a tax cannot be levied except where there is a succession, and when some element or step

necessary to complete it still is wanting when the tax law goes into effect. If some element is wanting at that time, the succession depends, for taking effect, on the continuance of the permission to succeed or grant of the right on the part of the State; and, as the grant may be withdrawn, it may be qualified by a tax. But if there is no succession, or if the succession has fully vested, or has passed beyond dependence upon the continuing of the State's permission or grant, an attempt to levy a tax under the power to regulate succession would be an attempt to appropriate property in a way which the Fourteenth Amendment has been construed to forbid. No matter what other taxes might be levied, a succession tax could not be."

If the owner of property conveys it to trustees to pay the income to himself for life and on his death to distribute the principal among specified individuals, these individuals succeed to the property upon the execution of the trust instrument. It is the shifting of the power to control the devolution of the property and not the change in actual possession or enjoyment that constitutes the essence of "succession."

Chase National Bank v. *United States*, 278 U.S. 327.
Reinecke v. *Northern Trust Co.*, 278 U.S. 339.
May v. *Heiner*, 281 U.S. 238.

Hence, as is held in *Hunt* v. *Wicht*, 174 Cal. 205, and the other cases in the group cited above, an excise with respect to the succession cannot be imposed by an act passed after the trust instrument is delivered.

Although these cases were, of course, brought to the attention of the Supreme Judicial Court, the opinion of that court makes no reference to them, so that the reasons for deeming them inapplicable are left to inference. It was not suggested that the statute, as applied to the present

situation, could be sustained on the theory that it was designed to prevent evasion of the tax upon testamentary dispositions, since there was no such tax at the time when the trust was established. Neither was it attempted to uphold the tax on the ground that the transfer was in contemplation of death; the facts furnish no foundation for any such contention. Since the settlors retained no right of revocation and no power to control the devolution of the property in any way, there was no basis for distinction in that respect. Emphasis was, however, laid on the fact that, in the present cases, the interest of each son, while vested, was subject to be divested in favor of his next of kin if he should die before the survivor of the settlors and it was said that the succession therefore took place when the survivor of the settlors died. Upon this point the court said (R. 20-21):—

> "Under the deed of trust while either settlor lived the sons had no unrestricted right to receive and to use the proceeds of the property such as came to them upon the death of the last surviving settlor.
>
> "It is that succession to unrestricted and absolute title, in place of no possession or enjoyment whatever and a contingency as to title, which is made subject to the excise under the statute. The acquisition of the rights which accrued to the five sons on the death of the last settlor was a fundamental change in the nature of their relation to and interest in the trust.
>
> "It replaced a contingency with a certainty. Full title, complete and unrestricted in every particular, did not vest in them until that event. By that event the actual transfer of the possession of the trust fund passed under the terms of the deed of July, 1907, from the trustees to the five sons and the full enjoyment thereof as to title and income for the first time became theirs. It seems to us that this change constituted a succession. The excise is not levied on mere enjoyment, possession or ownership: it is levied upon the assured and com-

pleted ripening of a more or less tenuous, dubious and immature right into actual possession, irrevocable enjoyment and full title. We think that this constituted a succession which lawfully might be made subject to the excise by a statute enacted and effective before such succession took place."

The same facts in substance were presented, however, in several of the cases cited by the appellants from other States and the element of defeasibility was expressly held immaterial. Thus in *Matter of Pell*, 171 N.Y. 48, which has often been referred to as a leading case, the court said (at p. 55):—

"This court and the Supreme Court of the United States have held in numerous cases that the transfer tax is not imposed upon property, but upon the right of succession. It, therefore, follows that where there was a complete vesting of a residuary estate before the enactment of the transfer tax statute, it cannot be reached by that form of taxation. In the case before us it is an undisputed fact that these remainders had vested in 1863, and the only contingency leading to their divesting was the death of a remainderman in the lifetime of the life tenant, in which event the children of the one so dying would be substituted. If these estates in remainder were vested prior to the enactment of the Transfer Tax Act there could be in no legal sense a transfer of the property at the time of possession and enjoyment. This being so, to impose a tax based on the succession would be to diminish the value of these vested estates, to impair the obligation of a contract and take private property for public use without compensation."

The facts and the conclusion were substantially the same in *Matter of Craig*, 97 App. Div. 289 (affirmed on opinion

below, 181 N.Y. 551), *Lacey* v. *State Treasurer*, 152 Iowa, 477, and *Houston's Estate*, 276 Penn. St. 330.

In *Carter* v. *Bugbee*, 92 N.J. L. 390, which may be cited as supporting a contrary view, the court was careful to distinguish *Matter of Pell* and similar cases and rested the decision on the narrow ground that under the instrument before it the remainder interests were purely contingent and not, as in *Matter of Pell*, vested subject to a defeasance; it was indicated that, if the trust deed had effected an immediate transfer of the title to the remainder, the decision might well have been the other way. In *People* v. *Carpenter*, 264 Ill. 400, the facts somewhat resembled those in *Carter* v. *Bugbee*, but the only question decided was one of statutory construction. It is submitted, therefore, that this court should be slow to hold,—as must be held if the judgments now in question are affirmed,—that *Hunt* v. *Wight*, *Matter of Pell* and the other cases to the same effect were wrongly decided. The significance of such a weight of authority was remarked upon by Mr. Justice White in *Haddock* v. *Haddock*, 201 U.S. 562 (at p. 585):—

> "Whilst we may not avoid the duty of interpreting for ourselves the Constitution of the United States, in view of the persuasive force that would result if an overwhelming line of state decisions held the asserted doctrine, we come to consider that subject."

Decisions of state courts cannot, of course, prevail against controlling decisions by this court, but in the present situation there are no such controlling decisions. On the contrary, the conclusion reached by the Court of Appeals of New York and by the other courts which have taken the same view is the only one consistent with the opinions of this court. Indeed, the recent decision in *May* v. *Heiner*, 281 U.S. 238, is in itself almost enough to settle the whole matter. While the precise question decided in that case was one of statutory construction, rather than constitu-

tional power, the reasoning tends strongly to the result that, in a case like the present, the succession takes place once and for all when the trust instrument is executed and that there is no succession in the proper sense upon the mere ripening of the rights conferred by it. As was recognized in *May* v. *Heiner*, succession *ex vi termini* is a bilateral affair. There can be a succession in ownership only as one person succeeds to another as owner. In a case like the present the beneficiaries succeed to the settlors at the execution of the trust instrument; the respective rights of the settlors and beneficiaries in the property are irrevocably fixed at that time. The only persons to whom the sons could be said on any theory to have succeeded on the death of the surviving settlor were their respective next of kin, but it is obvious that there was no succession here; the title was vested in the sons and the mere fading out of the contingent rights of the next of kin (who had no power in any way to deprive the sons of their title) no more constituted "succession" by the sons than would, for example, the lapsing of an attachment through the entry of judgment for the defendant constitute a succession by the owner of the attached property to the attaching creditor. The vital element of a relinquishment of rights by one person in favor of another was altogether lacking.

An analysis of the grounds upon which succession taxes have been upheld by this court confirms this conclusion. Such a tax is valid, if at all, because it relates to the exercise of some privilege which the State may grant or withhold at pleasure. This was settled long ago as to property passing by will or by the laws of intestate succession.

> *United States* v. *Perkins*, 163 U.S. 625, 628.
> *Mager* v. *Grima*, 8 How. 490, 494.

A tax upon transfers by deed or otherwise *inter vivos* may sometimes be justified as a means of preventing evasion of the tax on testamentary dispositions. Again, the

settlor may in connection with such a transfer reserve for his life a right to revoke the grant or to affect the devolution of the trust property in some other way; in such a case the instrument is really a species of will, so that the basis for imposing a tax at the settlor's death is the same as that for imposing such a tax at the death of a testator. Apart from these considerations,—neither of which, as shown above, is relevant to the present cases,—the only sufficient basis of an excise tax with respect to the ripening of interests created by deed is the fact that the creation of future interests is not one of the rights inherent in every property owner but is, like the creation of rights by will, a privilege which the State may withhold or confer as it sees fit.

> "There is no natural right to create artificial and technical estates with limitations over, nor has the remainderman any more right to succeed to the possession of property under such deeds than legatees and devisees under a will. The privilege of acquiring property by such an instrument is as much dependent upon the law as that of acquiring property by inheritance, and transfers by deed to take effect at death, have frequently been classed with death duties, legacy and inheritance taxes."
>
> Lamar, J., in *Keeney* v. *New York*, 222 U.S. 525 (at p. 533).

It may be conceded that, when the present trust instrument was executed, both the settlors in creating the various interests for which it provides and the beneficiaries in acquiring these interests were exercising a privilege granted by the State and that, as a condition of the exercise of this privilege, the State might have provided that a tax be paid when the survivor of the settlors should die. This, in effect, was what happened in *Keeney* v. *New York*, *supra;* after the passing of the tax law an owner of property conveyed it

to a trustee to hold for herself for life with remainder over, reserving a power to revoke or alter the trust at pleasure. As the parties availed themselves of the privilege which the State granted, they could not complain of the condition attached to it. The result would have been the reverse if, as in the present cases, the trust had been created at a time when no law imposed any tax with respect to future interests created by deed and the trust deed had reserved no power to alter or revoke. Having granted without restriction the privilege of creating and acquiring these interests, it was not competent for the State afterwards to attach conditions. What had originally been a mere privilege had now become an absolute right and the State could not interfere with it. After the remainders were once vested, the State had no more power to disturb them than it would have had to disturb an estate in actual possession. If, after the present trust was created, the legislature had assumed to pass an act which in any way interfered with the deed's taking effect according to its tenor or prevented the beneficiaries from coming into the enjoyment of all the privileges which it purported to confer upon them, the invalidity of the act would have been too plain for argument.

Aetna Life Ins. Co. v. *Hoppin*, 214 Fed. Rep. 928.
Gilpin v. *Williams*, 25 Ohio St. 283.
Bright v. *Supreme Council Catholic Knights & Ladies of America*, 183 Ky. 388.
Albertson v. *Landon*, 42 Conn. 209.

Rights like those of the sons under the deed now in question are far less tenuous than an estate by courtesy initiate, which, as is well settled, cannot be impaired by legislation.

Jackson v. *Jackson*, 144 Ill. 274.
Rose v. *Rose*, 104 Ky. 48.
Clay v. *Mayr*, 144 Mo. 376.
Wyatt v. *Smith*, 25 W. Va. 813.

These principles are fully recognized in Massachusetts; it has been held, for example, that the common law interest of a husband in a remainder in personal property bequeathed to his wife upon the contingency of her surviving the life tenant cannot be impaired by a statute passed before the happening of the contingency.

Dunn v. *Sargent*, 101 Mass. 336.

It follows that the present tax cannot be sustained on the theory that it is incident to the exercise of a privilege. Neither can it be assimilated to taxes on sales, on conveyances or on contracts; no one becomes subject to a tax of that kind unless he voluntarily does the act upon which the tax is imposed. The present tax must rest on the assumption that whenever anything happens to the advantage of an individual,—even though it comes to pass through circumstances over which neither he nor anybody else has control,—this may be made the subject of an excise. That this is the theory of the Supreme Judicial Court is made clear by the statement that "the excise is not levied on mere enjoyment, possession or ownership," but "upon the assured and completed ripening of a more or less tenuous, dubious and immature right into actual possession, irrevocable enjoyment and full title." The limitless field thus opened for the imposition of excises is manifest. What, for example, is more "tenuous, dubious and immature" than a crop of apples in early spring? If the Supreme Judicial Court is right, the ripening of the crop into saleable fruit is a proper subject, not for a tax on the apples as property, but for an excise on the change from a potentiality into an actuality. The statement of such a doctrine is, the appellants submit, its own answer.

The Supreme Judicial Court maintains, indeed, that this anomalous theory is sanctioned by this court, but an examination of the four cases cited in the opinion shows that this is a misconception.

In *Cahen* v. *Brewster*, 203 U.S. 543, it was held that under the law of Louisiana the property of a testator does not, as against the State, vest in his legatees until the administration of the estate is complete. A tax upon the passing of property by a will allowed shortly before the enactment of the tax law was therefore sustained as a tax on a privilege which was still within the control of the State at the time when the law took effect.

In *Chanler* v. *Kelsey*, 205 U.S. 466, a testatrix who died in 1902 executed by her will a power of appointment created by deed in 1844. The question was whether under a statute passed in 1897 a succession tax might be imposed upon the property passing through the exercise of the power. It was held that, since the will took effect only by virtue of the law as it stood at the donee's death, the acquisition of rights under the power stood on the same footing as the acquisition of rights under the will, so that the tax was valid as the condition of exercising a privilege which the State might either give or withhold. The court said (at p. 478):—

> "We must accept this decision of the New York Court of Appeals holding that it is the exercise of the power which is the essential thing to transfer the estates upon which the tax is imposed. That power was exercised under the will of Laura Delano, a right which was conferred upon her under the laws of the State of New York and for the exercise of which the statute was competent to impose the tax in the exercise of the sovereign power of the legislature over the right to make a disposition of property by will."

In *Nickel* v. *Cole*, 256 U.S. 222, the Supreme Court of Nevada decided that, according to the true construction of the trust instrument, no rights under it vested until after the effective date of tax law and this court simply held that, as this view was at least arguable and did not appear to have been adopted in order to evade constitutional difficul-

ties, the validity of the statute as applied to rights vested before it took effect could not be gone into.

In *Saltonstall* v. *Saltonstall*, 276 U.S. 260, the Massachusetts statute now under consideration was sustained as applied to a trust which was created before its enactment. The Supreme Judicial Court (R. 21) says that, "although the facts in the case at bar differ in some particulars from those in *Saltonstall* v. *Saltonstall*, . . . that decision supports the conclusion that these excises might lawfully be levied." It becomes important, therefore, to consider just what the facts in *Saltonstall* v. *Saltonstall* were. In the opinion of this court these facts were stated as follows (276 U.S. at p. 268):—

> "On various dates between 1905 and 1907, Peter C. Brooks by indenture transferred to the trustees, defendants in error, or their predecessors, certain property upon trust, to pay the income to him for life or, at his option, to allow it to accumulate, and upon the death of himself and his wife to pay the income to his children, the plaintiffs in error, without any liability for their debts and without power of alienation or anticipation; with gifts over.
>
> "The trust instrument provided that its terms might be changed and the trust terminated in whole or in part by Peter C. Brooks, with the concurrence of one trustee. Before his death, on January 27, 1920, the trust was in fact thrice altered, the last time in 1919 by providing that during the life of Peter C. Brooks the income should be accumulated and added to the principal, so that from that date his interest in the trust was terminated, except for the power with one trustee to alter or terminate it.
>
> "At the time of the several transfers there were no Massachusetts statutes imposing an inheritance or transfer tax upon property passing to children, but before the death of Peter C. Brooks the statutes now assailed were enacted."

It is thus apparent that, while the remainder may have been vested in the technical sense, it was liable at any time during the settlor's life to be wiped out through the exercise of the reserved power of alteration and revocation. What terminated this possibility and rendered the remainder indefeasible was not, as in the present cases, a fortuitous circumstance over which nobody had any control, but the non-exercise of this power. In other words, the interests of the remaindermen, so long as the settlor lived, were liable to be defeated by voluntary intervention, and were finally established by a quasi-testamentary act. For practical purposes, those in whom the power of amendment and revocation was vested were the owners of the fee and it was only when this *de facto* ownership was terminated through the non-exercise of the power that the remaindermen, in any real sense, succeeded to the settlor as the owners of the property.

The decision of this court in *Saltonstall* v. *Saltonstall* was carefully limited to these particular facts. Mr. Justice Stone said (at p. 271):—

> "The present tax is not laid on the donor, but on the beneficiary; the gift taxed is not one long since completed, but one which never passed to the beneficiaries beyond recall until the death of the donor; and the value of the gift at that operative moment, rather than at some later date, is the basis of the tax.
>
> "So long as the privilege of succession has not been fully exercised it may be reached by the tax. . . . And in determining whether it has been so exercised technical distinctions between vested remainders and other interests are of little avail, for the shifting of the economic benefits and burdens of property, which is the subject of a succession tax, may even in the case of a vested remainder be restricted or suspended by other legal devices. A power of appointment reserved by the donor leaves the transfer, as to him, incomplete and

subject to tax. *Bullen* v. *Wisconsin*, 240 U. S. 625. The beneficiary's acquisition of the property is equally incomplete whether the power be reserved to the donor or another. And so the property passing to the beneficiaries here was acquired only because of default in the exercise of the power during the donor's life and thus was on his death subject to the state's power to tax as an inheritance.

"Without considering the other statutes involved, we need not go further than to say that the statute of 1909, imposing the tax because of the failure to exercise the power of appointment, does not deprive plaintiffs in error of their property without due process of law."

The paragraph last quoted is significant. The Supreme Judicial Court had undertaken to sustain the tax not only on the ground that the non-exercise of the power of revocation constituted the non-exercise of a power of appointment within the meaning of the Massachusetts statute, but also on the broad ground that the mere coming into possession by the remaindermen on the settlor's death was itself taxable (256 Mass. 519). This court, however, avoided committing itself to any such doctrine and affirmed the judgment of the Supreme Judicial Court solely on the narrow ground first mentioned.

In the present cases the essential facts are exactly the opposite of those in *Saltonstall* v. *Saltonstall*. The gift taxed was completed when the trust deed was executed and it then passed to the beneficiaries beyond recall. No power of alteration or revocation was reserved. Nothing done or omitted by the donor or by any one else after the establishment of the trust affected in any way the devolution of the property, or, indeed, could have affected it.

The distinction is pointed out by the Supreme Court of Minnesota in the case of *State* v. *Brooks*, decided Septem-

ber 26, 1930 (U.S. Daily, October 10, 1930, p. 7). A settlor created a trust reserving to himself a general power of appointment by will and providing that in default of appointment the trust property should be conveyed to his heirs at his death. Very large powers to dispose both of the income and of the principal during the settlor's life were given to the trustees. The settlor died intestate. It was held that a succession tax might be levied under an act which took effect after the making of the trust deed, the court saying that the case was governed by *Chanler* v. *Kelsey*, 205 U.S. 466, and *Saltonstall* v. *Saltonstall*, for the reason that the reservation of the power to appoint by will had the same effect as a power of revocation, and that *Nichols* v. *Coolidge*, 274 U.S. 531, was not controlling because there was in that case "no reserve power either of revocation or of appointment." *State* v. *Probate Court of Washington County*, 102 Minn. 268, cited above, was distinguished on the same ground.

If the decision of the Supreme Judicial Court in the cases at bar is right, it follows, not only that the distinction thus drawn by the Supreme Court of Minnesota was mistaken, but that all of the points upon which this court was so careful to insist in *Saltonstall* v. *Saltonstall* were irrelevant, and that the opinion,—with its plain implication that the tax was valid only because these elements were present,—was entirely misconceived. The appellants do not believe that this court was laboring under any such misapprehension.

II.

The Statute as construed by the Courts below denies to the Petitioners and to those claiming under them the equal Protection of the Laws.

For the purpose of determining whether the tax is discriminatory reference must be made to the state of things which actually existed when the survivor of the settlors

died. At that time, as at all times subsequent to the assignment, the entire beneficial interest in the trust property was vested in the sons.

Blanchard v. *Blanchard*, 1 Allen, 223.

All that prevented the arrangement from becoming a mere dry trust, so as to enable the sons to call for the immediate conveyance of the legal title, was the possibility that a son might die while one or both of the parents survived, in which event his interest would be divested and his next of kin would take his share.

The respondent, as the appellants understand, virtually concedes that the right of the State to impose a tax at the death of the survivor of the settlors is at least no greater than it would be if the trust had been created at the date of the assignment and if the trust deed itself had vested the entire beneficial interest in the sons, subject as to any one of them who might die before the survivor of the settlors to be divested in favor of his next of kin.

Brown v. *Gulliford*, 181 Iowa, 897.
People v. *Welch's Estate*, 235 Mich. 555.

Upon Mrs. Coolidge's death nothing moved from her or her estate and no interest theretofore enjoyed by her ceased. Her death had no effect whatever upon the trust property except as it affected the relation of third persons to it. The same was true with respect to Mr. Coolidge's death. If any event except the deaths of the settlors,—*e.g.*, the death of some third person,—had been named as fixing the time when the possibility of divesting was to cease, there would be no tax on any theory. It was, therefore, earnestly contended in the state courts by the appellants both in their requests for rulings and in argument that, if the statute applies to the present situation, it arbitrarily singles out a particular event as an occasion for a tax and that, if the settlor retains

no interest in the property and neither he nor his nominee has any control over it, there is no justification for imposing a tax at the time of *his* death and at the same time imposing no tax upon the happening of any other event which might similarly affect the rights of the beneficiaries. The Supreme Judicial Court did not see fit to refer to this contention, but it is submitted that an argument supported by repeated decisions of this court cannot be brushed aside so lightly.

In *Reinecke* v. *Northern Trust Co.*, 278 U.S. 339, it was recognized that a tax imposed upon any such theory would be most anomalous and it was therefore held that a statute ought not, in the absence of unmistakable language, to be construed as intended to impose it. The court said (at p. 347):—

> "One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos*, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute."

In the present cases the Supreme Judicial Court has held that the legislature of Massachusetts intended the result which this court deemed "so incongruous" that an intention to produce it could not be imputed to Congress and it must, therefore, be assumed for the present purpose that the legislature undertook to make the purely arbitrary distinction upon which the respondent insists. Such a discrimination, the appellants submit, is repugnant to the rules upon which this court has acted in many recent cases.

While the power of classification for purposes of taxation is broad, it will not sustain a discrimination having no reasonable basis.

> *Louisville Gas & Electric Co.* v. *Coleman*, 277 U.S. 32.
>
> *Air-Way Electric Appliance Corporation* v. *Day*, 266 U.S. 71.
>
> *Royster Guano Co.* v. *Virginia*, 253 U.S. 412.
>
> *Southern Railway* v. *Greene*, 216 U.S. 400.

Schlesinger v. *Wisconsin*, 270 U.S. 230, is especially pertinent. In that case the court said (at p. 239):—

> "No question is made of the State's power to tax gifts actually made in anticipation of death, as though the property passed by will or descent; nor is there denial of the power of the State to tax gifts *inter vivos* when not arbitrarily exerted.
>
> "The challenged enactment plainly undertakes to raise a conclusive presumption that all material gifts within six years of death were made in anticipation of it and to lay a graduated inheritance tax upon them without regard to the actual intent. The presumption is declared to be conclusive and cannot be overcome by evidence. It is no mere *prima facie* presumption of fact.
>
> "The court below declared that a tax on gifts *inter vivos* only could not be so laid as to hit those made within six years of the donor's death and exempt all others—this would be 'wholly arbitrary.' We agree with this view and are of opinion that such a classification would be in plain conflict with the Fourteenth Amendment. The legislative action here challenged is no less arbitrary. Gifts *inter vivos* within six years of death, but in fact made without contemplation thereof, are first conclusively presumed to have been so made without regard to actualities, while like gifts at other

times are not thus treated. There is no adequate basis for this distinction."

The following remark by Mr. Justice Lamar in *Keeney* v. *New York*, 222 U.S. 525 (at p. 536), will perhaps be cited by the respondent as sustaining a contrary view:—

> "There can be no arbitrary and unreasonable discrimination. But when there is a difference it need not be great or conspicuous in order to warrant classification. In the present instance, and so far as the Fourteenth Amendment is concerned, the State could put transfers intended to take effect at the death of the grantor in a class with transfers by descent, will or gifts in contemplation of the death of the donor, without, at the same time, taxing transfers intended to take effect on the death of some person other than the grantor, or on the happening of a certain or contingent event."

The meaning of this passage is lost, however, unless the words "in the present instance" are noted. In *Keeney* v. *New York* the trust instrument reserved to the settlor both a life interest and a power of revocation; there were, therefore, ample grounds for imposing a tax at the death of the settlor, although there would have been no tax if the death of a third person had been named as the decisive event. The question now presented was not before the court and the language of the opinion was limited to the particular facts.

As applied to the present situation, therefore, the statute, —even if it would be constitutional as applied to a case in which the settlor had retained a life interest,—deprives the petitioners and those claiming under them of the equal protection of the laws.

ROBERT G. DODGE.
HAROLD S. DAVIS.

MASSACHUSETTS STATUTES.

Acts of 1907, Chapter 563.

SECTION 1. All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of the commonwealth or not, which shall pass by will, or by the laws regulating intestate succession, or by deed, grant, or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person, absolutely or in trust, except to or for the use of charitable, educational or religious societies or institutions, the property of which is by law exempt from taxation, or for or upon trust for any charitable purposes, or to or for the use of a city or town for public purposes, or to or for the use of (class A) the husband, wife, lineal ancestor, lineal descendant, adopted child, the lineal descendant of any adopted child, the wife or widow of a son, or the husband of a daughter, of a decedent, or to or for the use of (class B) the brother, sister, nephew or niece of a decedent, shall be subject to a tax of five per cent of its value for the use of the commonwealth; and such property which shall so pass to or for the use of a member of class A shall be subject to a tax of one per cent of its value for the use of the commonwealth if such value does not exceed fifty thousand dollars, to a tax of one and one half per cent if its value exceeds fifty thousand and does not exceed one hundred thousand dollars, and to a tax of two per cent if its value exceeds one hundred thousand dollars; and such property which shall so pass to or for the use of a member of class B shall be subject to a tax of three per cent of its value for the use of the commonwealth if such value does not exceed twenty-five thousand dollars, to a tax of four per cent if its value exceeds twenty five thousand and does not exceed one hundred thousand dollars, and to a tax of five per cent

if its value exceeds one hundred thousand dollars; and administrators, executors and trustees, and any grantees under such conveyance made during the grantor's life, shall be liable for such taxes, with interest, until the same have been paid; but no bequest, devise or distributive share of an estate which shall so pass to or for the use of a husband, wife, father, mother, child or adopted child of the deceased, unless its value exceeds ten thousand dollars, and no other bequest, devise or distributive share of an estate unless its value exceeds one thousand dollars, shall be subject to the provisions of this act; but no tax shall be exacted upon property so passing which shall reduce its value below the amount of the above exemptions.

Section 25. This act shall not apply to estates of persons deceased prior to the date when it takes effect, or to property passing by deed, grant, sale, or gift made prior to said date; but said estates and property shall remain subject to the provisions of the laws in force prior to the passage of this act.

Section 27. This act shall take effect on the first day of September in the year nineteen hundred and seven.

Acts of 1909, Chapter 490, Part IV.

Section 1. All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of the commonwealth or not, which shall pass by will, or by the laws regulating intestate succession, or by deed, grant, or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person, absolutely or in trust, except to or for the use of charitable, educational or religious societies or institutions, the property of which is by law exempt from taxation, or for or upon trust for any charitable purposes, or to or

for the use of a city or town for public purposes, or to or for the use of (class A) the husband, wife, lineal ancestor, lineal descendant, adopted child, the lineal descendant of any adopted child, the wife or widow of a son, or the husband of a daughter, of a decedent, or to or for the use of (class B) the brother, sister, nephew or niece of a decedent, shall be subject to a tax of five per cent of its value for the use of the commonwealth; and such property which shall so pass to or for the use of a member of class A shall be subject to a tax of one per cent of its value for the use of the commonwealth if such value does not exceed fifty thousand dollars, to a tax of one and one half per cent if its value exceeds fifty thousand and does not exceed one hundred thousand dollars, and to a tax of two per cent if its value exceeds one hundred thousand dollars; and such property which shall so pass to or for the use of a member of class B shall be subject to a tax of three per cent of its value for the use of the commonwealth if such value does not exceed twenty-five thousand dollars, to a tax of four per cent if its value exceeds twenty-five thousand and does not exceed one hundred thousand dollars, and to a tax of five per cent if its value exceeds one hundred thousand dollars; and administrators, executors and trustees, and any grantees under such conveyance made during the grantor's life, shall be liable for such taxes, with interest, until the same have been paid; but no bequest, devise or distributive share of an estate which shall so pass to or for the use of a husband, wife, father, mother, child or adopted child of the deceased, unless its value exceeds ten thousand dollars, and no other bequest, devise or distributive share of an estate unless its value exceeds one thousand dollars, shall be subject to the provisions of this part; but no tax shall be exacted upon property so passing which shall reduce its value below the amount of the above exemptions.

Section 25. This part shall not apply to estates of persons deceased prior to the date when chapter five hun-

dred and sixty-three of the acts of the year nineteen hundred and seven took effect, nor to property passing by deed, grant, sale or gift made prior to said date; but said estates and property shall remain subject to the provisions of law in force prior to the passage of said chapter.

Acts of 1912, Chapter 678.

SECTION 1. Section one of chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven, codified as section one of Part IV of chapter four hundred and ninety of the acts of the year nineteen hundred and nine, as amended by section one of chapter two hundred and sixty-eight and section one of chapter five hundred and twenty-seven of the acts of the year nineteen hundred and nine, is hereby further amended by striking out said section and inserting in place thereof the following:— *Section 1.* All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, belonging to inhabitants of the commonwealth, and all real estate within the commonwealth, or any interest therein, belonging to persons who are not inhabitants of the commonwealth, which shall pass by will, or by the laws regulating intestate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person, absolutely or in trust, except to or for the use of charitable, educational or religious societies or institutions, the property of which is by the laws of this commonwealth exempt from taxation, or for or upon trust for any charitable purposes, to be carried out within this commonwealth, or to or for the use of a city or town within this commonwealth for public purposes, or to or for the use of (class A) the husband, wife, lineal ancestor, lineal descendant, adopted child, the lineal descendant of any adopted child, the adoptive parent or lineal ancestor of an adoptive parent,

the wife or widow of a son, or the husband of a daughter, of a decedent, or to or for the use of (class B) the brother, sister, nephew or niece of a decedent, shall be subject to a tax of five per cent of its value for the use of the commonwealth, if its value does not exceed fifty thousand dollars, to a tax of six per cent if its value exceeds fifty thousand and does not exceed two hundred and fifty thousand dollars, to a tax of seven per cent if its value exceeds two hundred and fifty thousand and does not exceed one million dollars, and to a tax of eight per cent if its value exceeds one million dollars; and such property which shall so pass to or for the use of a member of class A shall be subject to a tax of one per cent of its value for the use of the commonwealth if such value does not exceed fifty thousand dollars, to a tax of two per cent if its value exceeds fifty thousand and does not exceed two hundred and fifty thousand dollars, to a tax of three per cent if its value exceeds two hundred and fifty thousand and does not exceed one million dollars, and to a tax of four per cent if its value exceeds one million dollars; and such property which shall so pass to or for the use of a member of class B shall be subject to a tax of two per cent of its value for the use of the commonwealth if such value does not exceed ten thousand dollars, to a tax of three per cent if its value exceeds ten thousand and does not exceed twenty-five thousand dollars, to a tax of five per cent if its value exceeds twenty-five thousand and does not exceed fifty thousand dollars, to a tax of six per cent if its value exceeds fifty thousand and does not exceed two hundred and fifty thousand dollars, to a tax of seven per cent if its value exceeds two hundred and fifty thousand and does not exceeds one million dollars, and to a tax of eight per cent if its value exceeds one million dollars; and administrators, executors and trustees, and any grantees under such conveyance made during the grantor's life, shall be liable for such taxes, with interest, until the same have been paid; but no bequest, devise or distributive share of an

estate which shall so pass to or for the use of a husband, wife, father, mother, child, adopted child, adoptive father or adoptive mother of the deceased, unless its value exceeds ten thousand dollars, and no other bequest, devise or distributive share of an estate unless its value exceeds one thousand dollars, shall be subject to the provisions of this act; but no tax shall be exacted upon property so passing which shall reduce its value below the amount of the above exemptions. All taxes under this act shall be paid out of and chargeable to capital and not income, unless otherwise provided in a will or codicil, but nothing herein contained shall affect any right of the commonwealth to collect such tax or lien therefor.

Section 3. The provisions of section one of this act shall apply to the estates of all persons dying subsequent to the passage hereof, and to all property passing by deed, grant or gift except in cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor or donor, if such death occurs subsequent to the passage hereof; and to all property passing by the exercise of or failure or neglect to exercise a power of appointment, whenever created, unless such exercise or failure or neglect to exercise such power of appointment over such property so passing has already been taxed under the provisions of a prior statute and the said tax paid or guaranteed or secured as provided by law; and the estates of persons dying prior to the passage hereof, and all property passing by deed, grant or gift taking effect in possession or enjoyment prior to the passage hereof, and all property passing by the exercise of or failure or neglect to exercise a power of appointment prior to the passage hereof, shall remain subject to the laws in force prior to the passage hereof.

Acts of 1914, Chapter 563.

SECTION 1. Section twenty-five of chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven, codified as section twenty-five of Part IV of chapter four hundred and ninety of the acts of the year nineteen hundred and nine, is hereby amended by inserting after the word "made", in the fifth line, the words:— or intended to take effect in possession or enjoyment after the death of the grantor when such death occurred,—so as to read as follows:— *Section 25.* This part shall not apply to estates of persons deceased prior to the date when chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven took effect, nor to property passing by deed, grant, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor when such death occurred prior to said date; but said estates and property shall remain subject to the provisions of law in force prior to the passage of said chapter.

General Laws (in effect on and after January 1, 1921). Chapter 65.

SECTION 1. All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of the commonwealth or not, which shall pass by will, or by laws regulating intestate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made in contemplation of the death of the grantor or donor or made or intended to take effect in possession or enjoyment after his death, and any beneficial interest therein which shall arise or accrue by survivorship in any form of joint ownership in which the decedent joint owner contributed during his life any part of the property held in such joint ownership or of the purchase price thereof, to any person, absolutely or in trust, except to or for the

use of charitable, educational or religious societies or institutions, the property of which is by the laws of the commonwealth exempt from taxation, or for or upon trust for any charitable purposes to be carried out within the commonwealth, or to or for the use of the commonwealth or any town therein for public purposes, shall be subject to a tax at the percentage rates fixed by the following table:

[Here follows the table of rates.]

SECTION 27 [as amended by St. 1922, c. 520, §18]. The commissioner shall determine the amount of tax due and payable upon any estate or part thereof, and shall certify the amount so due and payable to the persons by whom the tax is payable; but in the determination of the amount of any tax under this chapter the commissioner shall not be required to consider any payments on account of debts or expenses of administration which have not been allowed by the probate court having jurisdiction of said estate. Payment of the amount so certified shall be a discharge of the tax. An executor, administrator, trustee, grantee, donee or survivor aggrieved by any determination of the commissioner may, within one year after the payment of any such tax, apply by a petition in equity to the probate court having jurisdiction of the estate of the decedent for the abatement of the tax or any part thereof, and if the court adjudges that the tax or any part thereof was wrongly exacted it shall order an abatement of such part thereof as was assessed without authority of law. Upon a final decision ordering an abatement of any part of such a tax, the treasurer shall pay the amount adjudged to have been illegally exacted, with interest, without any further act or resolve making appropriation therefor.

SECTION 36. This chapter shall apply only to property or interests therein passing or accruing upon the death of persons dying on or after May fourth, nineteen hundred and twenty, and as to all property and interests therein

passing or accruing upon the death of persons who have died prior to said date the laws theretofore applicable shall remain in force; but so much of this chapter as relates to property or interests therein passing by deed, grant or gift completed inter vivos in contemplation of death shall apply only to such deeds, grants or gifts made on or after May twenty-seventh, nineteen hundred and twenty.

Chapter 215.

SECTION 9. A person aggrieved by an order, decree or denial of a probate court made after this chapter takes effect, may, within twenty days after the entry thereof, appeal from the same to the supreme judicial court, and the appeal shall be heard and determined by the full court, which shall have like powers and authority in respect thereto as upon an appeal in a suit in equity under the general equity jurisdiction.

SECTION 13. A judge of the probate court by whom a case or matter is heard for final determination may reserve and report the evidence and all questions of law therein for consideration of the full court, and thereupon like proceedings shall be had as upon appeal.

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In the

Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 33.

HAROLD J. COOLIDGE AND AUGUSTUS P. LORING, TRUSTEES, *Appellants*,

v.

HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS.

No. 34.

SAME *v.* SAME.

BRIEF FOR HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS.

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In the

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No. 33.

HAROLD J. COOLIDGE AND AUGUSTUS P. LORING, TRUSTEES, *Appellants*,

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HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS.

No. 34.

SAME *v.* SAME.

APPEAL FROM THE PROBATE COURT OF NORFOLK COUNTY, STATE OF MASSACHUSETTS.

BRIEF FOR HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS.

INTRODUCTION.

The issues of law involved in these two cases are identical, and there is no substantial difference upon the facts. Case No. 33 relates to the Massachusetts legacy and succession tax on the interest passing under a trust deed in property

furnished by Julia Coolidge. Case No. 34 relates to the same tax on the interest passing under the same trust deed in property furnished by J. Randolph Coolidge. The cases are both argued in this one brief. References to pages of the Record are to the Records in both cases, the page numbering in each being practically identical.

Opinion Below.

These cases were reserved without decision by the Probate Court for the County of Norfolk for the determination of the Supreme Judicial Court for the Commonwealth of Massachusetts (R. 12), and were heard by the Supreme Judicial Court prior to the entry of final decrees after rescript (R. 14 and 23) in the Probate Court. The opinion is reported in 1929 Massachusetts Advance Sheets, p. 1831, but has not yet been printed in the bound volume of the Massachusetts reports. It may also be found in 167 Northeastern Reporter, 757.

Jurisdiction.

The appellants, in accordance with paragraph 1 of Rule 12 of the Revised Rules of this Court, duly filed statements disclosing the alleged basis of the jurisdiction of this Court; and this Court made on March 10, 1930, a finding of probable jurisdiction in each case. Counsel here make no contention that this Court has not jurisdiction to review the final decrees of the Probate Court for the County of Norfolk in these causes.

Statement of the Cases.

The appellants are trustees under a deed and declaration of trust executed on July 29, 1907, by J. Randolph Coolidge, Julia Coolidge, and the appellants (R. 5). By that deed real and personal estate was transferred to the trustees by

the settlors voluntarily, and not as a bona-fide purchase for full consideration in money or money's worth (R. 6). Three-sevenths of the trust property was furnished by Julia Coolidge and four-sevenths by her husband, J. Randolph Coolidge (R. 6).

By its terms the trust instrument provided, in substance, for the payment of the income of the trust to the settlors, J. Randolph Coolidge and Julia Coolidge, for their joint lives, in the respective portions of four-sevenths and three-sevenths; the entire income was to go to the survivor; and upon the death of the survivor the trust property was to be divided equally among the five children of the settlors (R. 8). It was provided, in substance, that, if any of the children should die before the surviving settlor, the interest of such deceased child should go to the heirs of the deceased, determined according to the statute of distributions in effect at the time of the death of such survivor (R. 8). There was no power of revocation, modification, or termination. A copy of the trust may be found on pages 6-10 of the Record.

By instrument of assignment executed on April 6, 1917, the settlors assigned all their interest in the trust funds and all their right to receive the income therefrom to the five ultimate beneficiaries, all of whom eventually survived to take their distributive shares (R. 6). A copy of the assignment may be found on pages 10-12 of the Record.

Julia Coolidge died January 6, 1921, and J. Randolph Coolidge died November 10, 1925, both residents of Brookline, Massachusetts (R. 5 and 6). The appellee Commissioner determined that the appellants were subject, as of November 10, 1925, to excise taxes under G.L., c. 65, § 1, as amended, upon the three-sevenths and four-sevenths of the trust estate furnished, respectively, by each settlor (R. 6). It is the validity of these taxes which is here in issue. There is no controversy as to the amount of the excise, if any is due (R. 6).

The taxes assessed to the appellants on account of the interest passing from Julia Coolidge amounted to $20,082.01, and on account of the interest passing from J. Randolph Coolidge to $25,201.82. Both taxes were paid by the appellants under protest on November 10, 1926 (R. 6). They filed petitions, later amended, for abatement of the taxes, in the Probate Court for the County of Norfolk (R. 2-4). The Probate Court, without making any decision, reserved all questions of law presented by the cases for the determination of the Supreme Judicial Court of the Commonwealth (R. 12). The Supreme Judicial Court, after hearing, sent down rescripts directing that decrees be entered denying each petition for abatement (R. 14). In accordance with the rescripts, the Probate Court dismissed each petition (R. 23 and 24), from which decrees these appeals were made to this Court (R. 24-26).

History of Legislation.

At the time the trust was created, namely, July 29, 1907, there was no statute operative under which the trust property could have been subjected to an excise, because the succession was to direct descendants of the settlors. Statutes then in force provided for the levy of an excise only where the succession was to collateral relatives and strangers. Such a statute had long been in force in Massachusetts,

St. 1891, c. 425,

and provided:

> *Section 1.* "All property within the jurisdiction of the Commonwealth, . . . which shall pass . . . by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person . . . other than to or for the use of the . . . lineal descendant . . . of a decedent, . . . shall be subject to a tax . . ."

The type of trust, therefore, that was executed by the Coolidges on July 29, 1907, had long been recognized as taxable by Massachusetts statutes. If the succession in the Coolidge trust had been to collateral heirs or strangers, the trust would clearly have come within the provisions of the 1891 statute and been taxable.

Furthermore, a legacy and succession tax upon direct descendants had been enacted by the Massachusetts Legislature on June 27, 1907, slightly more than a month prior to the creation of the trust, to take effect on September 1, 1907, about five weeks after the date of the trust.

St. 1907, c. 563.

This is the first relevant statute. Its provisions included direct descendants within the meaning of "person" for the first time, and in other pertinent particulars were:

> *Section 1.* "All property within the jurisdiction of the Commonwealth . . . which shall pass by . . . deed, grant, or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person . . . shall be subject to a tax . . ."
>
> *Section 25.* "This act shall not apply to estates of persons deceased prior to the date when it takes effect, or to property passing by deed, grant, sale, or gift made prior to said date . . ."
>
> *Section 27.* "This act shall take effect on the first day of September in the year nineteen hundred and seven."

It is obvious that the Coolidge trust was created in an attempt to escape the tax imposed by the 1907 statute. This is especially apparent from its provisions, which included within the trust any property which might in the future be

conveyed to the trustees by the Coolidges prior to September 1, 1907 (R. 7).

The provisions of the 1907 statute, under which the Coolidge trust would not have been taxable because created prior to September 1, 1907, were amended in 1912,

St. 1912, c. 678,

from the time of which amendment the Coolidge trust has been clearly within the provisions of the Massachusetts legacy and succession tax law. Section 1 of the 1912 statute amended section 1 of the 1907 statute in particulars not here material; and it was then provided:

> *Section 3.* "The provisions of section one of this act shall apply to the estates of all persons dying subsequent to the passage hereof, and to all property passing by deed, grant, sale or gift except in cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor or donor, *if such death occurs subsequent to the passage hereof . . .*" (Italics ours.)

The fact that the Coolidge trust was executed prior to September 1, 1907, thus became of no importance in 1912, and has so remained ever since. After the enactment of the act of May 29, 1912, the Coolidge trust was clearly taxable in spite of the fact that the trust instrument was executed prior to September 1, 1907.

Furthermore, in 1914 the significance of the date, September 1, 1907, in its relation to the creation of the trust was eliminated.

St. 1914, c. 563.

By this amendment the Massachusetts legacy and succession tax statutes imposing a tax upon a gift made or intended to take effect in possession or enjoyment after death

provided that there should be an exemption from taxation only where the death of the grantor occurred prior to September 1, 1907. The pertinent section of the 1914 amendment was:

> *Section 1.* "This part [the amended 1907 statute] shall not apply to . . . property passing by deed, grant, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor when such death occurred prior to said date [September 1, 1907] . . ."

The relevant statutory provisions applicable to the taxes, the validity of which is in issue here, are in G.L., c. 65, entitled "Taxation of Legacies and Successions," as follows:

> *Section 1.* "All property within the jurisdiction of the commonwealth . . . which shall pass by . . . deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth . . . made or intended to take effect in possession or enjoyment after his death . . . to any person, absolutely or in trust . . . shall be subject to a tax . . ."
>
> *Section 36.* "This chapter shall apply only to property or interests therein passing or accruing upon the death of persons dying on or after May fourth, nineteen hundred and twenty . . ."

There have been no amendments to G.L., c. 65, in any particular here material.

The deaths of both Julia Coolidge and J. Randolph Coolidge, in connection with whose estates the taxes were assessed and paid, occurred subsequently to May 4, 1920, the effective date for the application of G.L., c. 65, § 1, to property passing upon death. It is under this statute that the taxes were determined.

Summary of Argument.

I.

The Massachusetts legacy and succession tax statute as construed by the Court below is valid under the Constitution of the United States as a succession tax upon the exercise of the privilege of receiving in 1925 property passing dependently upon the death of the settlors under a trust created in 1907.

II.

The imposition of such an excise here does not deny to the appellants the equal protection of the laws nor deprive them of property without due process of law nor impair the obligation of a contract, under the Constitution of the United States.

Points and Authorities.

I.

THE MASSACHUSETTS LEGACY AND SUCCESSION TAX STATUTE AS CONSTRUED BY THE COURT BELOW IS VALID UNDER THE CONSTITUTION OF THE UNITED STATES AS A SUCCESSION TAX UPON THE EXERCISE OF THE PRIVILEGE OF RECEIVING IN 1925 PROPERTY PASSING DEPENDENTLY UPON THE DEATH OF THE SETTLORS UNDER A TRUST CREATED IN 1907.

There is no doubt, and it has been properly conceded by the appellants in their brief (p. 7), that the Massachusetts legacy and succession tax statute was properly construed by the Court below as imposing a succession tax upon the passing of the Coolidge trust property in 1925.

The Coolidge trust indenture must be here considered, therefore, to be a deed, grant or gift, without full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor or donor, under the provisions of the Massachusetts succession tax statute. It was stipulated by all

parties that the Coolidge "transfer was voluntary and was not a bona fide purchase for full consideration in money or money's worth" (R. 6).

This Court accepts the construction placed upon the Massachusetts excise statutes by the Court below.

Chanler v. *Kelsey*, 205 U.S. 466, 477.
Stebbins v. *Riley*, 268 U.S. 137, 146.

It will therefore accept the decisions of the Massachusetts Court that these statutes impose an excise upon the privilege of succession and that such privilege of succession is not fully exercised until the gift takes effect in possession and enjoyment.

It should be borne clearly in mind that the Massachusetts excise tax is a tax upon the right to receive. It was early pointed out in

Crocker v. *Shaw*, 174 Mass. 266,

that the Massachusetts statute of 1891, the first inheritance tax statute in Massachusetts, was an excise upon the privilege of (1) disposing of property after death, and (2) succeeding to it, the Court holding it to be immaterial that the trusts in that case were dated and executed prior to the passage of the 1891 statute, saying:

> "It is the vesting of the property in possession and enjoyment on the death of the grantor and after the statute took effect, that renders it liable to the tax."

So, too, in

Attorney General v. *Stone*, 209 Mass. 186,

the Massachusetts Court said, regarding this tax:

> "This is an excise tax, imposed not only upon the right of the owner of property to transmit it after his death, but also upon the privilege of his beneficiaries to succeed to the property thus dealt with. The privilege is

not fully exercised until the property shall have come into the possession of the beneficiary."

Again, in

Clarke v. *Treasurer and Receiver General*, 226 Mass. 301,

the Court made the following statement with regard to the theory of the Massachusetts inheritance tax:

"The excise tax is laid on the privilege of receiving the legacy by will. That is the 'commodity' which is taxable. It has been held that the passing into possession and enjoyment of such property is subject to such taxation even though the instrument under which the property passes was executed and effective before the statute imposing the excise was enacted."

This Court has, furthermore, accepted the theory of the Massachusetts excise as a succession tax in the opinion of Mr. Justice Stone in the case of

Saltonstall v. *Saltonstall*, 276 U.S. 260.

The Commonwealth contends that this *Saltonstall* case is clearly decisive of the validity of the excise here attacked. Mr. Justice Stone cited numerous Massachusetts decisions as to the character of the excise, pointed out the difference between the Federal estate tax involved in the case of *Nichols* v. *Coolidge*, 274 U.S. 531, and the Massachusetts succession tax involved in the *Saltonstall* case, and stated:

"But we are here concerned, not with a tax on the privilege of transmission, not with an attempt to tax a donor's estate for an absolute gift made when no tax was thought of, . . . but with a tax on the privilege of succession . . . The present tax is not laid on the donor but on the beneficiary; the gift taxed is not one

long since completed, but one which never passed to the beneficiaries beyond recall until the death of the donor . . .

"So long as the privilege of succession has not been fully exercised it may be reached by the tax."

Since the Massachusetts excise is imposed on the succession to property by the beneficiaries, it necessarily follows that it makes no difference when the trust was executed under which the succession takes place. As long as the statute imposing the excise is enacted prior to the receipt by the beneficiaries of the property, a valid excise may be imposed upon such receipt.

For an extreme instance of the imposition of the Massachusetts succession tax upon the passing of property even where the decedent died before the enactment of the taxing statute, see

Magee v. *Commissioner of Corporations and Taxation*, 256 Mass. 512:

The statute involved in this case took effect on July 22, 1919. It was applied to the will of a testatrix who died on July 6, 1919. The will was allowed on August 4, 1919. In holding valid the excise as so applied, the Massachusetts Court said:

"The statute here attacked as applied to the estate of the testatrix is not open to objections on constitutional grounds. It does not in truth operate retroactively with reference to the present estate. The tax was imposed upon a commodity still in existence when the statute went into effect."

The *Saltonstall* case seems to be clear authority in defense of the present excises from attack on the ground that the Coolidge trust was enacted prior to the passage of

G.L., c. 65, § 1, which was applied to it. In the *Saltonstall* case the trust was executed similarly to the present Coolidge trust in 1905, 1906, and 1907. The settlor died January 27, 1920, and it was held that the statute of 1916 imposing a tax was valid with relation to the Saltonstall trust, the Massachusetts opinion, affirmed by this Court, stating:

> "The statute imposes an excise upon succession to property . . . Since the excise may be levied upon the commodity known as succession, it may validly be imposed so long as any part of that commodity remains in existence."
>
> *Saltonstall* v. *Treasurer and Receiver General*, 256 Mass. 519.

And, indeed, the Court below was of the opinion that its *Coolidge* decision was supported by the *Saltonstall* case:

> "Although the facts in the case at bar differ in some particulars from those in *Saltonstall* v. *Saltonstall*, 276 U.S. 260, we think that that decision supports the conclusion that these excises might be lawfully levied."
>
> *Coolidge* v. *Commissioner*, 1929 Mass. Adv. Sh. 1831, 1838.

This Court accepts and is bound by the construction placed by the Court below upon the deed of trust.

> *Nickel* v. *Cole*, 256 U.S. 222, 225.
> *Enterprise Irrigation District* v. *Canal Co.*, 243 U.S. 157, 164.

It is therefore not open to question here that the net trust estate passing to the five sons under the Coolidge trust took effect in possession and enjoyment on the death of the surviving settlor and is subject to the Massachusetts excise statute here imposed. The Court below clearly decided that the excise statute applied to the passing of the trust prop-

erty on November 10, 1925, under a trust executed on July 29, 1907. The language of the Court below on that point is helpful:

> "The settlors by the deed of July, 1907, divested themselves of all power of disposition over the principal of the trust. It then passed irrevocably from their control. After that they possessed only rights to the income. Thus they did not divest themselves of all interest in the property. They stripped themselves of those rights in April, 1917. That is not pertinent to the issues here involved because before that time *the statute had been changed as to taxation of successions so as to include the kind of succession established by the deed of July, 1907.* Confessedly at the time of the execution of the trust deed there was no statute exacting an excise on the transfer of the property or on succession to it. This, however, in our opinion is not a decisive factor. *The present excise under the statute was levied on the succession, not on the transmission, of the trust fund.* As already pointed out succession is a quite different thing from transmission. It is manifest from the terms of the declaration of trust that the death of the survivor of the settlors was expressly fixed as the effective date of succession by the final beneficiaries to the enjoyment of the principal and income of the trust estate. The excise statute here controlling . . . is designed to include within its sweep all methods of succession to property to take effect in possession or enjoyment after the death of the grantor or donor other than those made *inter vivos* for a bona fide consideration. By express words it embraces succession created by deed. *Whenever property is conveyed upon such limitation that it will vest in interest, possession or enjoyment by reason of the death of the grantor or donor, such succession falls within the descriptive words of the statute.* The succession to any

of these attributes of property occurring as the result of the death of the grantor or donor constitutes the taxable commodity." (Italics ours.)

Coolidge v. *Commissioner,* 1929 Mass. Adv. Sh. 1831, 1834, 1835.

The argument that the taxes are invalid because retroactive in their application is erroneous and based upon an inaccurate understanding of the nature and theory of the Massachusetts legacy and succession tax. The Massachusetts excises are not imposed on the transfers of 1907 or 1917, prior to the enactment of the 1920 taxing statute, but on the receipt of the property in 1925, five years after the enactment of the 1920 statute. They are by no means retroactive taxes.

The Commonwealth further bases its succession taxes upon the ground that the remainders over to the five children could never have taken effect during the lifetime of the Coolidges. The remainders over were not independent of, but clearly dependent upon, the deaths of the Coolidges. And this is true although there was no power of revocation reserved in the original trust instrument, and although in April, 1917, the Coolidges gave up their rights to the income.

The tax is valid even though, after the 1917 assignment, and therefore at the time of the deaths of the settlors in 1921 and 1925, respectively, the Coolidge trust might fairly be said to be a trust to trustees to pay the income to the Coolidge children during the lives of Julia Coolidge and J. Randolph Coolidge, and the survivor, and then to the Coolidge children absolutely; with the provision that "if any of the Coolidge children should die before the time for distribution the heirs of any deceased child should take the parent's share."

The dependence of the interest of the remaindermen upon the deaths of the settlors was clearly shown when this Cool-

idge trust was before the Massachusetts Court in 1920 in the case of

Coolidge v. *Loring*, 235 Mass. 220.

From this case it appears that after the 1917 assignment the trustees were requested to convey the trust property to the five children, the ultimate beneficiaries, absolutely and free from any trust. This demand on the trustees for an immediate distribution of the fund was refused by reason of the "possible claim of a contingent interest on behalf of wives and children of sons predeceasing" the settlors. The Massachusetts Court refused to reform the instrument.

In the opinion of the Massachusetts Court in the present litigation, the dependence of the succession in this Coolidge trust upon the deaths of the settlors was clearly pointed out:

> "The assignment of their life interest in the income of the trust by the settlors to their sons in 1917 did not operate to alter the nature of the trust instrument or of the transaction out of which spring the rights of the final beneficiaries. *It is obvious that this assignment did not, even in combination with the trust instrument of July, 1907, vest the entire interest of the trust in the five sons.* . . . But manifestly the trust could not then terminate, because the succession could not take place or be ascertained until the death of the survivor of the settlors." (Italics ours.)
>
> *Coolidge* v. *Commissioner of Corporations and Taxation*, 1929 Mass. Adv. Sh. 1831, 1835.

It is true that the Coolidge trust is not the simple case of a gift to trustees to pay the income to the settlor for life and then over, as in

Crocker v. *Shaw*, 174 Mass. 266.

It is true that the Coolidges, by the deed of July, 1907, divested themselves of all power of disposition over the principal of the trust and stripped themselves of all interest in the income from the property by the assignment of April, 1917. But such a beneficial interest of the settlor in the income or a power of revocation is by no means necessary to the validity of the Massachusetts succession tax, as was decided by the Massachusetts Court in

State Street Trust Co. v. *Treasurer and Receiver General*, 209 Mass. 373:

> A conveyed property to trustees to pay the income to X and Y during A's life, and on A's death over, with no power of revocation. The Massachusetts Court held valid a tax upon the transfer over on A's death under this trust deed, and construed the Massachusetts tax in its effect upon trusts similar to the Coolidge one as follows:
>
> > "The test . . . by which . . . exemption [from the excise] is to be ascertained does not depend upon whether a power to revoke has or has not been inserted, but upon the passing of the property with all the attributes of ownership independently of the death of the transferror. It is the absence of the power of control with the unrestricted right of the recipient to dispose of the property and to receive and use the proceeds, which by the express language of the statute subjects it to the tax. . . . The intention of the settlor is plain, that the principal, even if it vested in title, was not to vest in possession and enjoyment during her life."

So again the Massachusetts Court construed the Massachusetts succession tax statute involved in

New England Trust Co. v. *Abbott*, 205 Mass. 279:

A transferred property to a trustee to pay the income to X for periods of five years each, the trust to terminate at the end of the five-year period following the death of A, and upon such termination over to X absolutely. The passing of this property was also held taxable.

The Massachusetts Court in construing the statute involved here lays down the test that a succession tax is validly imposed where the property does not pass independently of the death of the original settlor. The Massachusetts doctrine seems clearly to be that where, as here, the death of the settlor is necessary to the passing of the property to the ultimate beneficiaries, the excise is rightly imposed.

Massachusetts cases in which this same statute is construed clearly show that the Coolidge trust was properly included within its provisions. The *State Street Trust Company* case deals definitely with the absence of a power of revocation, and states that it makes no difference, holding that the tax is valid notwithstanding. The *State Street Trust Company* and the *New England Trust Company* cases show that the 1917 assignment divesting the settlors of all beneficial interest in the trust makes no difference, that the tax is still valid.

The fact that Julia Coolidge died in 1921, while the property did not pass until 1925, makes no difference according to the construction of the statute by the Massachusetts Court.

New England Trust Co. v. *Abbott*, 205 Mass. 279,

where an appreciable length of time was to elapse after the death before the payment over of the trust property.

And this point is carefully covered by the Court below in its opinion in this case:

> "It is not necessary to the validity of the excise on succession that an interest in the property pass directly from the grantor or settlor at the time of his death. . . . If the beneficiary under the instrument of gift succeeds to an interest in the property not previously enjoyed, which bears a distinct and necessary relation to the death of the grantor or settlor, that is a succession subjected to the excise by the terms of the statute."
>
> *Coolidge* v. *Commissioner,* 1929 Mass. Adv. Sh. 1831, 1835, 1836.

The language of the Massachusetts cases shows that the time of passage is not so important as the nature of the passage. It is not necessary, in order for the tax to be properly assessed, that the property pass immediately in point of time upon the death of the settlor. It is only necessary, for the purposes of the tax, that the passage of the property have a definite relation to the death of the grantor, that it cannot pass while the settlor is living, that the passage is not independent of the death of the settlor.

In this *Coolidge* case the deaths of the settlors were a condition precedent, without the occurrence of which the beneficiaries could not take.

There is no requirement that the property pass immediately upon the death of the grantor in order for a tax to be validly imposed. The words of the statute are not "to take effect . . . *upon* the death of the grantor," but rather "to take effect . . . *after* the death of the grantor." It is not the *time,* but the *nature,* of the succession which renders the passing subject to the imposition of the excise.

> *Boston Safe Deposit & Trust Co.* v. *Commissioner,* 1929 Mass. Adv. Sh. 1233, 1237.

The Court below in this *Coolidge* case pointed out many times that the *nature* of the Coolidge trust subjected the passing of property under it to the Massachusetts excise:

> "Plainly under the deed of July, 1907, the ultimate beneficiaries could not be determined with certainty until the death of both settlors. However unlikely, it nevertheless was possible that all or any number less than all of the five sons might predecease the survivor of the settlors. Which ones, if any of them, might so predecease could not be known until both settlors had died. No possession, enjoyment or title to the trust would ultimately vest in any son so predeceased or in his estate. *The interest of the sons surviving the settlors in the trust fund did not pass to them finally and irrevocably until and because of the death of both settlors.* The property conveyed to the trustees by the deed of trust was so limited that it vested in the sons who should survive both settlors in interest, possession and enjoyment only by reason of and upon the death of the survivor of the settlors. *This succession falls within the descriptive words of the statute.* The five sons of the settlors, who have become the ultimate beneficiaries of the trust, had no power of control individually or collectively over the trust fund while either of the settlors continued to live. They had no possession of it. That was vested exclusively in the trustees. They had no enjoyment of the trust fund, except as a vision of the future. They had no power of disposal of the whole or any part of the corpus of the trust estate. That power was enjoyed by the trustees alone. . . . Under the deed of trust while either settlor lived the sons had no unrestricted right to receive and use the proceeds of the property such as came to them upon the death of the last surviving settlor. *It is that succession to unrestricted and absolute title, in place of no possession or enjoyment whatever and a contin-*

gency as to title, which is made subject to the excise under the statute. The acquisition of the rights which accrued to the five sons on the death of the last settlor was a fundamental change in the nature of their relation to and interest in the trust. It replaced a contingency with a certainty. Full title, complete and unrestricted in every particular, did not vest in them until that event. By that event the actual transfer of the possession of the trust fund passed under the terms of the deed of July, 1907, from the trustees to the five sons and the full enjoyment thereof as to title and income for the first time became theirs. *It seems to us that this change constituted a succession.* The excise is not levied on mere enjoyment, possession or ownership: it is levied upon the assured and completed ripening of a more or less tenuous, dubious and immature right into actual possession, irrevocable enjoyment and full title. *We think that this constituted a succession which lawfully might be made subject to the excise by a statute enacted and effective before such succession took place.*" (Italics ours.)

Coolidge v. *Commissioner*, 1929 Mass. Adv. Sh. 1831, 1836, 1837.

In short, the fact of the deaths of Julia Coolidge and J. Randolph Coolidge was the "generating source" within the meaning of the opinion of Mr. Justice Sutherland in

Tyler v. *United States*, 281 U.S. 497,

from which the authority to impose the excises here in question came into being.

The earlier section of this brief (pp. 4-7), entitled "History of Legislation," shows clearly the intent of the Legislature to tax trusts of the nature of the Coolidge trust where the *generating source* of the succession, namely, the death of

the settlor, occurred after the enactment of the excise statute applicable. The Court below found properly that the passing of the property in 1925 was within the provisions of G.L., c. 65. The remainder of this brief discusses relevant decisions in State and United States Courts.

II.

THE IMPOSITION OF SUCH AN EXCISE HERE DOES NOT DENY TO THE APPELLANTS THE EQUAL PROTECTION OF THE LAWS NOR DEPRIVE THEM OF PROPERTY WITHOUT DUE PROCESS OF LAW NOR IMPAIR THE OBLIGATION OF A CONTRACT, UNDER THE CONSTITUTION OF THE UNITED STATES.

Such a succession tax upon grants made or intended to take effect in possession or enjoyment after the death of the grantor has long been held constitutional by Massachusetts and United States Courts.

The earliest case in Massachusetts on this subject pointed out that there is

> ". . . no difference in principle between property passing by a deed intended to take effect in possession or enjoyment on the death of the grantor and property passing by will. In either case it is the privilege of disposing of property after the death of the grantor or testator and of succeeding to it which is taxed, though the amount of the tax is determined by the value of the property. The constitutionality of the law in regard to taxing property passing by will was fully considered in *Minot* v. *Winthrop*, 162 Mass. 113, and that case, we think, is decisive of this."
>
> *Crocker* v. *Shaw*, 174 Mass. 266.

This early case has been consistently followed in Massachusetts. The succession to property by reason of death has been recognized for many years by the Massachusetts

Court as a commodity which rightly may be made subject to an excise.

Minot v. *Winthrop*, 162 Mass. 113, 115-122.
Callahan v. *Woodbridge*, 171 Mass. 595, 597.
Crocker v. *Shaw*, 174 Mass. 266, 267.
New England Trust Co. v. *Abbott*, 205 Mass. 279.
Minot v. *Treasurer and Receiver General*, 207 Mass. 588.
Attorney General v. *Stone*, 209 Mass. 186.
State Street Trust Co. v. *Treasurer and Receiver General*, 209 Mass. 373.
Burnham v. *Treasurer and Receiver General*, 212 Mass. 165.
Clarke v. *Treasurer and Receiver General*, 226 Mass. 301, 305.
Magee v. *Commissioner of Corporations and Taxation*, 256 Mass. 512, 515, 516.
Saltonstall v. *Treasurer and Receiver General*, 256 Mass. 519, 523, 524.
Boston Safe Deposit & Trust Co. v. *Commissioner*, 1929 Mass. Adv. Sh. 1233.
Coolidge v. *Commissioner of Corporations and Taxation*, 1929 Mass. Adv. Sh. 1831 (this case).

It is far too late for counsel to argue that the Massachusetts succession tax upon property passing under trusts made or intended to take effect in possession or enjoyment after death is unconstitutional.

The United States Supreme Court has also established the principle that a State may impose an excise upon the privilege of the donee to *succeed* to property in possession and enjoyment upon the death of the grantor, as well as upon the privilege of the grantor so to *transfer* it, whether occasioned by death,

Stebbins v. *Riley*, 268 U.S. 137,

or effected by deed.

Keeney v. *New York*, 222 U.S. 525.
Chanler v. *Kelsey*, 205 U.S. 466.
Nickel v. *Cole*, 256 U.S. 222.

The principle is thus stated in the *Stebbins* case:

> "The subject matter of an inheritance taxing statute may be either the transmission, or the exercise of the legal power of transmission, of property by will or descent . . . or it may be the legal privilege of taking property by devise or descent . . . There are two elements in every transfer of a decedent's estate; the one is the exercise of the legal power to transmit at death; the other is the privilege of succession. *Each, as we have seen, is the subject of taxation.*" (Italics ours.)

Stebbins v. *Riley*, 268 U.S. 137, 141, 144.

In the *Keeney* case, holding an excise on a succession effected by deed constitutional, Mr. Justice Lamar went so far as to say that even

> "where the grantor makes a transfer of property to take effect on the death of a third person, it might . . . be taxed as a devolution or succession."

Keeney v. *New York*, 222 U.S. 525, 535.

And the justice went on to point out that those grants which were to take effect after the death of the grantor were even more testamentary in character, and taxable.

In a recent case Mr. Justice Sutherland expressed the same principle:

> "Death duties rest on the principle that death is the 'generating source' from which the authority to impose such taxes takes its being, and 'it is the power to transmit or the transmission *or receipt of property* by death

which is the subject levied upon by all death duties.' *Knowlton* v. *Moore*, 178 U.S. 41, 56, 57." (Italics ours.)

Tyler v. *United States*, 281 U.S. 497.

In another case this Court laid down the principle that a State may constitutionally impose an excise upon the passing of property until the actual receipt of property by the beneficiary.

Cahen v. *Brewster*, 203 U.S. 543.

The element of succession being a taxable commodity, the imposition of an excise thereon has been held constitutional by a long line of United States Supreme Court decisions.

Carpenter v. *Pennsylvania*, 17 How. 456.
Orr v. *Gilman*, 183 U.S. 278.
Cahen v. *Brewster*, 203 U.S. 543.
Chanler v. *Kelsey*, 205 U.S. 466.
Moffitt v. *Kelly*, 218 U.S. 400, 405.
Nickel v. *Cole*, 256 U.S. 222.
Wachovia Bank & Trust Co. v. *Doughton*, 272 U.S. 567, 573.
Saltonstall v. *Saltonstall*, 276 U.S. 260.

Mr. Justice McReynolds stated in the *Wachovia* case:

"In *Orr* v. *Gilman*, 183 U.S. 278, and *Chanler* v. *Kelsey*, 205 U.S. 466, this court held that by an act passed subsequent to the instrument which created a power of appointment New York might tax its execution without violating the Fourteenth Amendment."

Wachovia Bank & Trust Co. v. *Doughton*, 272 U.S. 567, 573.

The principle that an excise may be imposed upon the privilege of succession at any time before that privilege is

fully exercised extends to and embraces cases where the excise is imposed by an act passed after the interest has vested in law but before it has taken effect in possession and enjoyment.

Carpenter v. *Pennsylvania*, 17 How. 456.
Cahen v. *Brewster*, 203 U.S. 543.
Moffitt v. *Kelly*, 218 U.S. 400.
Nickel v. *Cole*, 256 U.S. 222.
Saltonstall v. *Saltonstall*, 276 U.S. 260.

But it will be argued that the Coolidge trust is one where the settlors retained no power of control and no beneficial interest, where nothing happened at the death of the settlors, and that, therefore, the passing of the property which is here taxed bore no rational relationship to the death of the settlors, and that the excises are unconstitutional. It will be argued that recent United States Supreme Court decisions are authorities contrary to the contentions of the Commonwealth, and that the absence of a power of revocation and the absence of the retention of any beneficial interest in the settlors makes the excises on the Coolidge trust invalid.

Two cases which will be relied upon by the appellants in support of that argument are

Nichols v. *Coolidge*, 274 U.S. 531.
Reinecke v. *Northern Trust Co.*, 278 U.S. 339.

The case of *Nichols* v. *Coolidge* involved in its Federal estate tax aspect the identical trust here being considered in its Massachusetts succession tax aspect. This Court held that the Federal estate tax on the Coolidge trust was unconstitutional as contrary to the Fifth Amendment. The language of the Court was strong, but it is significant that Mr. Justice McReynolds, in his opinion, quoted the following from the case of *Edwards* v. *Slocum*, 264 U.S. 61, 62:

> "This is not a tax upon a residue, it is a tax upon a transfer of his net estate by a decedent . . . It comes into existence before and is independent of the receipt of the property by the legatee. It taxes, as Hanson, Death Duties, puts it in a passage cited in [*Knowlton* v. *Moore*,] 178 U.S. 49, 'not the interest to which some person succeeds on a death, but the interest which ceased by reason of death,' "

and pointed out that

> "The exaction is not a succession tax like the one sustained by . . . *Keeney* v. *New York*, 222 U.S. 525. The right to become beneficially entitled is not the occasion for it."

Thus it was apparent in the language of the opinion in the case of *Nichols* v. *Coolidge* itself that this Court distinguished a transfer tax from a succession tax. It is too clear for discussion, and has already been pointed out in this brief, that the Massachusetts excise is a succession tax. The *Coolidge* case in its Massachusetts succession tax aspect, therefore, is clearly distinguishable from the *Coolidge* case in its Federal estate tax aspect.

The case of *Reinecke* v. *Northern Trust Co.* is of considerable importance, placing, as it does, a decided emphasis upon the presence or absence of a power of revocation in determining whether a trust *inter vivos* is taxable or not under the Federal estate tax law. In that case seven trusts were involved, in two of which (hereinafter called the two trusts) the power to revoke had been retained by the settlor alone and in five of which (hereinafter called the five trusts) the power to revoke had been retained by the settlor only with the concurrence of one or more of the beneficiaries. This Court held that the two trusts were taxable and the five trusts were not taxable, regardless of the fact that the two trusts were executed prior to the taxing statute and

the five trusts were executed subsequent to the taxing statute. Mr. Justice Stone, who delivered the opinion, said:

> "A transfer . . . subject to a power of revocation in the transferor, terminable at his death, is not complete until his death . . . Hence § 402, as applied to the present transfers, is not retroactive, since his death followed the passage of the statute."

The *Reinecke* case involved only a matter of statutory construction, Mr. Justice Stone holding that the language of the Federal estate tax statute, "to take effect in possession or enjoyment at or after his death," properly construed, did not include within its terms the five trusts. The case is important here because of the ruling that a power to revoke concurrently with another person does not leave the power of control in the transferor. The five trusts were therefore declared in effect to be without any power of control by the transferor.

Once again, however, it must be remembered that this Court, in the *Reinecke* as in the *Coolidge* case, was dealing with the Federal estate tax, a tax upon the right to transfer. In the consideration of such a tax it is of the utmost importance to determine whether or not the power of control is left with the transferor. If the transferor has no beneficial interest and has no power of control, nothing passes from him at the time of his death. The *Coolidge* and *Reinecke* cases are by no means conclusive of this case at bar.

This distinction between the underlying theories of the Federal and Massachusetts taxes was further clarified by this Court in the decision of

Saltonstall v. *Saltonstall*, 276 U.S. 260.

In that case the United States Supreme Court was concerned with the Peter C. Brooks trust, made between 1905 and 1907 by Peter C. Brooks, providing that the income

should be paid to him for life and upon his death over. Mr. Brooks retained the power to revoke, with the concurrence of one trustee. Before his death Mr. Brooks provided that the income should be accumulated and added to the principal, so that at the time of his death his interest in the trust was terminated, except for his power with the concurrence of one trustee to alter or terminate. This Court had the validity of the Massachusetts succession tax before it. The tax was held to be valid, and the language of Mr. Justice Stone in that opinion clearly points out the fundamental difference between the theory of the Federal estate tax upon the right to transfer and the theory of the Massachusetts succession tax upon the right to receive. His language is quoted *supra*, pages 10, 11, in this brief.

Mr. Justice Stone has, moreover, in a recent United States Supreme Court decision, explained further his decision in *Saltonstall* v. *Saltonstall*. In the case of

> *Chase National Bank* v. *The United States*, 278 U.S. 327,

Mr. Justice Stone says:

> "In *Saltonstall* v. *Saltonstall*, 276 U.S. 260, a tax had been imposed . . . on the succession to a remainder interest which had vested under a trust created before the enactment of the taxing act. It was objected that the tax was void as retroactive and hence in conflict with the Fourteenth Amendment . . . But by the provisions of the trust indenture a power of disposition of the remainder had been reserved to the settlor to be exercised by him at any time during his life, with the concurrence of one trustee, and we held that the freeing of the remainder of the possibility of the exercise of that power, through its termination by the death of the settlor, effected a transfer which was the appropriate subject of a succession tax and that the tax was not

> retroactive since the termination of the power which was prerequisite to the complete succession did not occur until after the enactment of the statute. . . ."

The *Chase National Bank* case held the proceeds of insurance policies to be properly included in the gross estate of the decedent under the Federal estate tax statute where the decedent had retained the power to change the beneficiary.

Thus Mr. Justice Stone has settled any argument as to what the *Saltonstall* case decided. His language in the *Chase National Bank* case shows that this Court considers the *Saltonstall* case authority for the proposition that the Massachusetts succession tax was not invalid as retroactive so long as the privilege of succession had not been fully exercised until after the enactment of the taxing statute. The *Saltonstall* case, therefore, can no longer be limited to the peculiar facts dealing with the 1909 power of appointment statute.

It may be argued that the *Saltonstall* case does not go as far as the Commonwealth wishes this Court to go, since in the *Saltonstall* case there was a power to revoke. But the *Reinecke* case has said that a power to revoke depending upon the concurrence of another does not leave a power of control in the settlor sufficient for taxing purposes. The *Saltonstall* case, therefore, did not deal with a trust with absolute power of revocation. It is significant that Mr. Justice Stone pointed out in the *Chase National Bank* case that it was important that a succession tax was involved in the *Saltonstall* case rather than a transfer tax, quoting the following from his previous decision:

> "A power of appointment reserved by the donor leaves the transfer, as to him, incomplete and subject to tax. *Bullen* v. *Wisconsin*, 240 U.S. 625. The beneficiary's acquisition of the property is equally incomplete whether the power be reserved to the donor or another,"

and commenting on the quotation as follows:

> "That, it is true, was said of a succession tax, and we are here concerned with a transfer tax. The distinction was there important for it was at least doubtful whether upon the death of the settlor there was any such termination, as to him, of a power of control over the remainder such as would have been subject to a tax levied exclusively on transfers, since the power was not vested in him alone, but in him and another. See *Reinecke* v. *Northern Trust Company,* decided this day."

These words of Mr. Justice Stone in the *Chase National Bank* case are of vital importance. They show that the reason the tax in the *Saltonstall* case was held valid and the tax in the *Coolidge* case was held invalid was entirely because of the difference in theory of the two taxes involved in the cases. Mr. Justice Stone clearly intimates that, if the Brooks trust involved in the *Saltonstall* case had been before him in its Federal estate tax aspect, he would have been compelled to follow the *Coolidge* case, since the power to control, with the concurrence of another, which existed in the *Saltonstall* case, was no better for the purposes of a Federal tax than the absence of a power of revocation in the *Coolidge* case. In fact, the Federal estate tax upon the Brooks trust was held invalid by the District Court for the District of Massachusetts in the case of

Hill v. *Nichols,* 18 Fed. (2d) 139,

and no appeal appears to have been taken. The Federal District Court judge felt unable to distinguish the case from *Nichols* v. *Coolidge,* pointed out that the power to revoke reserved to Mr. Brooks was not an unqualified one, since he could only exercise this right with the consent of one or more of his trustees, and held that at the death of Mr.

Brooks he had no transmissible interest in the property and that the Federal estate tax was invalid.

The theory of the *Saltonstall* case is that the Massachusetts tax is on the privilege of the beneficiaries to receive. That depends not at all upon whether or not there is a power to revoke in the settlor, either alone or dependent upon the concurrence of another. What the settlor had when he died is of no consequence in determining whether or not a succession tax is validly imposed. The validity of such a succession tax depends solely upon what the beneficiaries received and whether such receipt can be rationally related to the death of the settlors from whom the property originally came.

We are here concerned with taxes upon the right to receive. If the property which was received by the Coolidge children on November 10, 1925, came from the settlors originally, and if the beneficiaries upon the death of the settlors received something, then the Massachusetts succession taxes are properly and constitutionally imposed. It is not essential for a succession tax that the transferor shall have retained any interest or the power to control. It is essential only that the beneficiaries shall have received something which came originally from the settlors in connection with whose death the tax is assessed.

In the light of the *Reinecke* and *Chase National Bank* cases, with their emphasis upon the power to control in the case of a tax on the right to transfer and with their holding that a power to revoke, dependent upon the assent of another, did not leave the power to control in the transferor, the *Saltonstall* case is clearly established as authority in support of the Commonwealth in the issues here presented. In the *Saltonstall* case there was no power of control in Mr. Brooks. The trust was executed prior to the enactment of the Massachusetts taxing statute. Mr. Justice Stone held that there was no retroactive feature, since it was a tax upon the right to receive and the privilege of succession

was exercised long after the enactment of the taxing statute, and that the Massachusetts tax was valid although Mr. Brooks had no beneficial interest in the income at the time of his death. The *Saltonstall* case is on all fours with the present *Coolidge* case.

The Court below recognized this distinction between a *transfer* tax and a *succession* tax in these words:

> "The case at bar is distinguishable from *Shwab* v. *Doyle*, 258 U.S. 529, *Shukert* v. *Allen*, 273 U.S. 545, *Nichols* v. *Coolidge*, 274 U.S. 531, *Reinecke* v. *Northern Trust Co.*, 278 U.S. 339, 345, 347, and *Chase National Bank* v. *United States*, 278 U.S. 327. In each of those cases the tax under consideration was the Federal estate tax levied upon the property of the deceased transmitted at his death. That is a tax levied upon a subject quite different from the succession to property by a beneficiary, which is the subject of the present excise."
>
> *Coolidge* v. *Commissioner*, 1929 Mass. Adv. Sh. 1831, 1839.

Transfer taxes rather than succession taxes were involved in many of the decisions cited in the brief of the appellants, including among others the United States Supreme Court cases of

May v. *Heiner*, 281 U.S. 238.
Reinecke v. *Northern Trust Co.*, 278 U.S. 339.
Chase National Bank v. *United States*, 278 U.S. 327.
Untermyer v. *Anderson*, 276 U.S. 440.
Blodgett v. *Holden*, 275 U.S. 142.
Nichols v. *Coolidge*, 274 U.S. 531.

Such cases are not in point here, where a succession tax has been imposed.

The Massachusetts statute here involved has been carefully construed in favor of the appellee by a long line of

Massachusetts and United States Supreme Court decisions. Decisions of other State Courts dealing with different statutes have no such probative value here.

It is submitted that the contention of the respondent is not only borne out by a long line of decisions in Massachusetts and by the United States Supreme Court decisions, but is also correct in principle. Taking the present case to illustrate, the Massachusetts taxes here assessed were excises upon the privilege on the part of the five Coolidge children to receive possession on November 10, 1925, of property of a trust created by J. Randolph Coolidge and Julia Coolidge. The Coolidges may have had no transmissible property at the time of their deaths and no power of control, and so a tax upon the right to transfer would necessarily be invalid. That is not the point. The point is whether the five Coolidge children received anything upon the deaths of the Coolidges. That they did receive something, it is submitted, is too clear for argument. The Commonwealth of Massachusetts has a right under its own and under the Federal Constitution to levy a tax upon that succession.

The theory of the appellants in their brief seems to be that, except where there is an attempted evasion of the tax or except where there is a power to revoke, the only basis for an excise tax on property passing under a deed is that the creation of future interests is a privilege which the State may withhold or confer as it sees fit. They argue that the future interests here involved were created before the enactment of the taxing statute, and that therefore the taxes interfered with vested interests and were invalid.

The appellee does not accept that theory. Something more is involved than the mere creation of future interests. The appellee's theory of a death excise is that it can constitutionally be imposed as long as the property passing by reason of the death has not reached its final resting place. An estate tax purports to tax the passage only until the

property leaves the control of the decedent. A succession tax, however, such as is involved here, goes farther and purports to tax the passage of the property upon its receipt in possession by the ultimate beneficiary.

Nor can it successfully be claimed, as it is in the appellants' brief, that the taxes are discriminatory and deny equal protection of the laws. The taxes here at issue are rationally related, as they should be, to the deaths of the persons from whom the property came. The case of *Keeney* v. *New York*, 222 U.S. 525, 536, is a complete answer to argument II in the appellants' brief, despite their protestations to the contrary. The distinctions made by the Massachusetts Court below are reasonable and in accordance with precedents established by this Court.

The case of *Nichols* v. *Coolidge*, 274 U.S. 531, leaves unshaken *Cahen* v. *Brewster*, 203 U.S. 543, and the line of cases ending with *Saltonstall* v. *Saltonstall*, 276 U.S. 260, which hold that a *succession* tax may be imposed on the donee at any time before the privilege of succession is completely exercised by the taking effect in possession or enjoyment. Those cases govern the case at bar.

Conclusion.

The taxes here involved are succession taxes. They are excises on the privilege of the five Coolidge children to receive the trust property on November 10, 1925. The children could not receive the property in possession until after the deaths of the settlors, Julia and J. Randolph Coolidge. The date of execution of the Coolidge trust is immaterial as long as the succession took place after the enactment of the taxing statute, as it did here. The statute was passed in 1920; the succession took place in 1925, after deaths occurring in 1921 and 1925. The property came from Julia and J. Randolph Coolidge originally. All the essentials to a valid succession tax are present. Massachusetts and

United States Court decisions uphold the validity and constitutionality of the taxes here in issue.

We therefore respectfully submit that the final decrees of the Probate Court for the County of Norfolk, Commonwealth of Massachusetts, should be affirmed.

Respectfully submitted,

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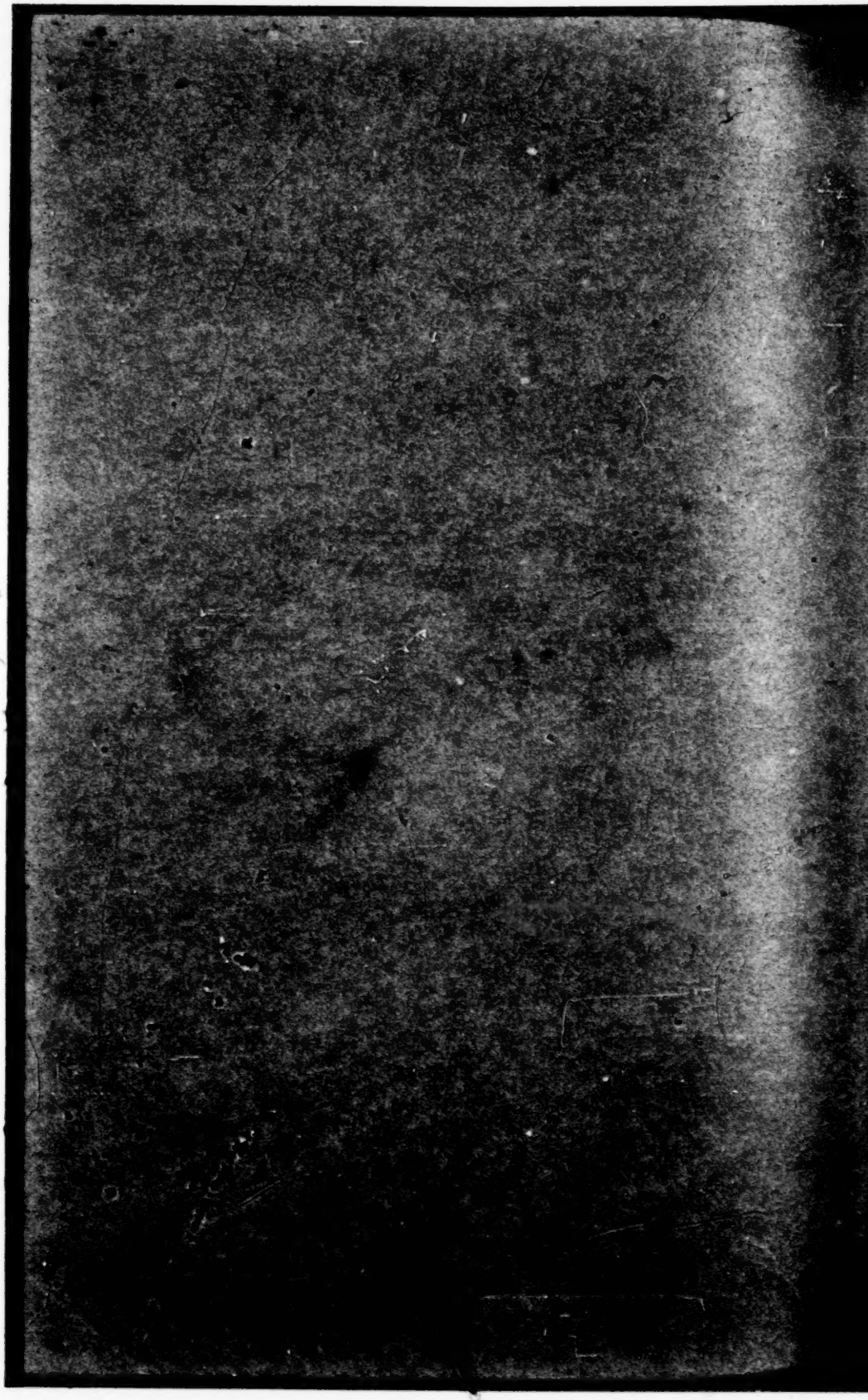

SUPREME COURT OF THE UNITED STATES.

Nos. 33 and 34.—October Term, 1930.

Harold J. Coolidge and Augustus P. Loring, Trustees, Appellants,
vs.
Henry F. Long, Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts.

Appeals from Probate Court of Norfolk County, State of Massachusetts.

[February 24, 1931.]

Mr. Justice Butler delivered the opinion of the Court.

Each of these appeals brings here for review a decree of the probate court of Norfolk county, Massachusetts, entered in accordance with a rescript from the supreme judicial court of the Commonwealth. Mass. Advance Sheets [1929] p. 1831. 167 N. E. 757. In each appellants presented to the probate court an application for the abatement of an inheritance tax assessed under § 1, c. 65, General Laws. There was drawn in question the validity of the statute on the ground of its being repugnant to the contract clause of the federal Constitution and the due process and equal protection clauses of the Fourteenth Amendment. The probate court reserved for the consideration of the supreme judicial court all questions of law and the matter of what decrees should be entered. That court held the statute valid and sustained the taxes.

The opinion states the facts as follows:

> "The petitioners [appellants here] are trustees under a deed and declaration of trust executed on July 29, 1907, by J. Randolph Coolidge and Julia Coolidge and the petitioners.
>
> "By that deed a large amount of real and personal estate was transferred to the trustees by the settlors voluntarily and not as a bona fide purchase for full consideration in money or in money's worth. The trustees were given extensive powers of management, investment and reinvestment with the right to determine finally what receipts and payments should be credited to income or principal. The part of the trust fund

furnished by J. Randolph Coolidge was four-sevenths, and the part furnished by Julia Coolidge was three-sevenths.

"By the terms of the trust the income was to be paid in these proportions to each of the settlors during their joint lives and then the entire income to the survivor, and, upon the death of the survivor, the principal was to be divided equally among their five sons, provided that, if any of the sons should predecease the survivor of the settlors, his share should go to those entitled to take his intestate property under the statute of distributions in force at the death of such survivor, with a further provision to the effect that in no event should a widow of such deceased son take as distributee more than half of such share.

"There was in the declaration of trust no power of revocation or modification or termination prior to the death of the survivor of the settlors. Coolidge *v.* Loring, 235 Mass. 220.

"By instrument executed on April 6, 1917, the settlors assigned their interest in the trust to the five sons, all of whom eventually survived the termination of the trust.

"Julia Coolidge died in January, 1921, and J. Randolph Coolidge on November 10, 1925, both being residents of this Commonwealth.

"The defendant determined that the petitioners were subject to excise taxes under G. L. c. 65, § 1, as amended, upon the four-sevenths and upon the three-sevenths of the trust estate furnished respectively by each settlor as of November 10, 1925."

When the declaration of trust was executed, no statute was in effect under which the succession to the trust property could have been subjected to this tax. The statutes then in force provided for the imposition of an excise only where the succession was to collateral relatives and strangers. The first relevant statute was approved June 27, 1907 (St. 1907, c. 563) and took effect September 1, about five weeks after the date of the declaration of the trust. It did not apply to property passing by deed, grant, sale or gift made prior to its effective date. But by § 3, c. 678, St. 1912, it was made applicable "to all property passing by deed, grant or gift . . . . made or intended to take effect in possession or enjoyment after the death of the grantor or donor, if such death occurs subsequent to the passage hereof." And see § 1, c. 563, St. 1914.

Chapter 65, General Laws, effective since January 1, 1921, provides:

§ 1. "All property within the jurisdiction of the commonwealth . . . . which shall pass by . . . . deed, grant or

grantor's

gift, except in cases of a bona fide purchase for full consideration in money or money's worth . . . made or intended to take effect in possession or enjoyment after his death . . . to any person, absolutely or in trust . . . shall be subject to a tax. . . ."

§ 36. "This chapter shall apply only to property or interests therein passing or accruing upon the death of persons dying on or after May fourth, nineteen hundred and twenty. . . ."

The supreme judicial court sustained the exaction as an excise. It held that possession or enjoyment upon the death of the survivor of the settlors was a taxable commodity under the statute enacted after the creation of the trust.

The trust deeds are contracts within the meaning of the contract clause of the Federal Constitution. They were fully executed before the taking effect of the state law under which the excise is claimed. The Commonwealth was without authority by subsequent legislation, whether enacted under the guise of its power to tax or otherwise, to alter their effect or to impair or destroy rights which had vested under them. *Appleby* v. *City of New York*, 271 U. S. 364. *Fletcher* v. *Peck*, 6 Cr. 87, 136. *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 624, 656. *Farrington* v. *Tennessee*, 95 U. S. 679, 683. *Carondelet Canal Co.* v. *Louisiana*, 233 U. S. 362, 373, 378.

This court has held that the Revenue Act of 1924, §§ 319-324, in so far as it undertook to impose a tax on gifts fully consummated before its provisions came before Congress (*Blodgett* v. *Holden*, 275 U. S. 142) or before its passage (*Untermyer* v. *Anderson*, 276 U. S. 440) was arbitrary and repugnant to the due process clause of the Fifth Amendment. In *Nichols* v. *Coolidge*, 274 U. S. 531, we considered the trust deed of Mrs. Coolidge that is now before us. The question in that case was whether the value of the property so conveyed prior to the enactment should be included in her estate for the purpose of ascertaining the federal estate tax thereon. We said (p. 542):

"This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. Brushaber v. Union Pacific R. R., 240 U. S. 1, 24. Barclay & Co. v. Edwards, 267 U. S. 442, 450. See also Knowlton v. Moore, 178 U. S. 41, 77. And we must conclude that section 402 (c) of the statute

here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

See *Levy* v. *Wardell*, 258 U. S. 542, 544. The States are similarly restrained by the due process clause of the Fourteenth Amendment.

In its opinion, the state court suggests that the federal estate tax was upon property of the deceased transferred at his death and that it was levied upon a subject "quite different from the succession to property by a beneficiary, which is the subject of the present excise." Undoubtedly the State has power to lay such an excise upon property so passing after the taking effect of the taxing Act. The fundamental question here is whether rights had so vested prior to the taking effect of the tax statute that there was thereafter no occasion in respect of which the excise might constitutionally be imposed. The state court held that the succession was not complete until the death of the survivor of the grantors and that therefore the tax is valid. It is well-understood that, when the jurisdiction of this court is invoked to determine whether a state law impairs the rights of the litigant under a prior contract, or whether the State is depriving him of his property without due process of law in violation of the Fourteenth Amendment and the question turns upon the existence or terms of a contract, this court is bound to determine for itself whether there is a contract and to ascertain its true meaning and effect. That rule is necessary in order that this court may properly enforce these provisions of the Constitution. *Railroad Commission* v. *Eastern Texas R. R.*, 264 U. S. 79, 86, and cases cited.

By the deed of each grantor one-fifth of the remainder was immediately vested in each of the sons subject to be divested only by his death before the death of the survivor of the settlors. It was a grant in praesenti to be possessed and enjoyed by the sons upon the death of such survivor. *Blanchard* v. *Blanchard*, 1 Allen 223. *Clarke* v. *Fay*, 205 Mass. 228. *McArthur* v. *Scott*, 113 U. S. 340, 379, and cases cited. And see *United States* v. *Fidelity Trust Co.*, 222 U. S. 158. *Henry* v. *United States*, 251 U. S. 393. The provision for the payment of income to the settlors during their lives did not operate to postpone the vesting in the sons of the right of possession or enjoy-

ment. The settlors divested themselves of all control over the principal; they had no power to revoke or modify the trust. *Coolidge* v. *Loring, supra,* 223. Upon the happening of the event specified without more, the trustees were bound to hand over the property to the beneficiaries. Neither the death of Mrs. Coolidge nor of her husband was a generating source of any right in the remaindermen. *Knowlton* v. *Moore,* 178 U. S. 41, 56. Nothing moved from her or him or from the estates of either when she or he died. There was no transmission then. The rights of the remaindermen, including possession and enjoyment upon the termination of the trusts, were derived solely from the deeds. The situation would have been precisely the same if the possibility of divestment had been made to cease upon the death of a third person instead of upon the death of the survivor of the settlors. The succession, when the time came, did not depend upon any permission or grant of the Commonwealth. While the sons if occasion should arise might by appropriate suit require the trustees to account, it is to be borne in mind that the property was never in the custody of the law or of any court. Resort might be had to the law to enforce the rights that had vested. But the Commonwealth was powerless to condition possession or enjoyment of what had been conveyed to them by the deeds. *Barnitz* v. *Beverly,* 163 U. S. 118, and cases cited.

The fact that each son was liable to be divested of the remainder by his own death before that of the survivor of the grantors does not render the succession incomplete. The vesting of actual possession and enjoyment depended upon an event which must inevitably happen by the efflux of time, and nothing but his failure to survive the settlors could prevent it. *Blanchard* v. *Blanchard, supra. Moore* v. *Lyons,* 25 Wend. 119, 144. Succession is effected as completely by a transfer of a life estate to one and remainder over to another as by a transfer in fee. *Reinecke* v. *Trust Co.,* 278 U. S. 339, 347-348. The recent case of *Saltonstall* v. *Saltonstall,* 276 U. S. 260, furnishes a good illustration of incomplete succession. There the remainder was liable at any time during the settlor's life to be divested through the exertion of the power of alteration and revocation that was reserved in the instrument creating the trust. The decision sustaining a transfer tax went upon the ground that "the gift taxed is . . . one which never passed to the beneficiaries beyond recall until the death of the

donor. . . . A power of appointment reserved by the donor leaves the transfer, as to him, incomplete and subject to tax. . . . The beneficiary's acquisition of the property is equally incomplete whether the power be reserved to the donor or another." p. 271. See also *Chase Nat. Bank* v. *United States*, 278 U. S. 327, 335, 338.

No Act of Congress has been held by this Court to impose a tax upon possession and enjoyment, the right to which had fully vested prior to the enactment.

Tyler v. *United States*, 281 U. S. 497, held constitutional §§ 201 and 202 of the Revenue Acts of 1916, 39 Stat. 756, 777-778, and of 1921, 42 Stat. 227, 277-278, which included in the gross estate the value of an interest held by decedent and any other person as tenants by the entirety. In each case, the estate was created after the passage of the applicable Act; and none of the property constituting it had prior to its creation ever belonged to the surviving spouse. The court held that the Acts did not impose a direct tax because, putting aside a common law fiction and having regard to substance, the death of one of the parties was in fact the generating source of important and definite accessions to the property rights of the other. It held that the provisions were intended to prevent an avoidance of the estate tax by the creation of such tenancies and were obviously neither arbitrary nor capricious and so not violative of the Fifth Amendment.

Clapp v. *Mason*, 94 U. S. 589, and *Mason* v. *Sargent*, 104 U. S. 689, arose under the succession tax Act of June 30, 1864, §§ 124 *et seq.*, 13 Stat. 285. *Vanderbilt* v. *Eidman*, 196 U. S. 480, and *Hertz* v. *Woodman*, 218 U. S. 205, arose under a similar Act of June 13, 1898, §§ 29 and 30, 30 Stat. 464. In all these cases, the property vested in interest after the Acts took effect, and the decisions went on the ground that the right to impose the excises did not accrue until the subsequent vesting in possession and enjoyment. Under these Acts, the mere passage of title was not sufficient; possession and enjoyment were also required. *Wright* v. *Blakeslee*, 101 U. S. 174, 177, went upon the ground that, up to the moment of the life tenant's death, "her children had no interest in the land except a bare contingent remainder expectant upon her death and their surviving her. At her death, it came to them as an estate in fee in possession absolute."

This court has not sustained any state law imposing an excise upon mere entry into possession and enjoyment of property, where the right to such possession and enjoyment upon the happening of a specified event had fully vested before the enactment.

In *Cahen* v. *Brewster*, 203 U. S. 543, the testator died May 26, 1904, the will was probated May 30, and a special inheritance tax law was passed June 28. It imposed a tax upon all inheritances and legacies, and provided that the tax should not be enforced when the property had borne its just proportion of taxes prior to the time of the inheritance and that the tax should be collected on all successions not finally closed. The enactment was assailed as repugnant to the due process and equal protection clauses of the Fourteenth Amendment. This court held that the State, without unconstitutional deprivation, could exercise its power to impose inheritance taxes at any time while it holds the property from the legatee, p. 551; and, dealing with the contention that taxing successions not closed and exempting those that had been closed operated to deny equal protection, the court said (p. 552): "It was certainly not improper classification to make the tax depend upon a fact without which it would not have been valid." As the court said in *United States* v. *Jones*, 236 U. S. 106, 112, "It hardly needs statement that personal property does not pass directly from a decedent to legatees or distributees, but goes primarily to the executor or administrator, who is to apply it, so far as may be necessary, in paying debts of the deceased and expenses of administration, and is then to pass the residue, if any, to legatees or distributees. See also *Carpenter* v. *Pennsylvania*, 17 How. 456, 462.

In *Moffitt* v. *Kelly*, 218 U. S. 400, Moffitt married in California in 1863 and resided there with his wife until his death in 1906. By his will, he gave to her and their children as if he had died intestate. A state law passed in 1905 imposed a tax upon property so descending. The state court sustained the tax upon the wife's share in the community property. This court held that the nature and character of her right was a local question and that the tax was not violative of the contract clause of the Constitution or the due process or equal protection clause of the Fourteenth Amendment. In *United States* v. *Robbins*, 269 U. S. 315, this court considered the character of the wife's estate during the existence of the community, and said (p. 326): "We can see no sufficient reason

to doubt that the settled opinion of the Supreme Court of California, at least with reference to the time before the later statutes, is that the wife had a mere expectancy while living with her husband. The latest decision that we have seen dealing directly with the matter explicitly takes that view, says that it is a rule of property that has been settled for more than sixty years . . . ." See also *Poe* v. *Seaborn*, 282 U. S. 101, 116. Cf. *Nickel* v. *Cole*, 256 U. S. 222, 225.

Chanler v. *Kelsey*, 205 U. S. 466, arose under the New York inheritance tax law of 1897. Prior to its enactment, a father conveyed property to trustees to pay the income to his daughter for life with remainder to her issue in fee or in default of issue to her heirs in fee, and gave her power by will to appoint the remainder among her issue or heirs in such manner and proportions as she might determine. She died in 1902 and by her will exercised the power. The tax law deemed such appointment a transfer and made it taxable. It was attacked as repugnant to the due process clause of the Fourteenth Amendment and the contract clause. This court held that without such appointment the estates in remainder would have gone to all in the class named in the deeds; that, by the exercise of the power, some were divested of their estates and the same were vested in others, and that it was only on the exercise of the power that the estates of the appointees became complete. And it sustained the tax. Justices Holmes and Moody, dissenting, insisted that the succession was complete when the father's deeds took effect, and that "the execution of the power did not depend in any way upon the continued cooperation of the laws of New York by way of permission or grant." p. 481.

The overwhelming weight of authority sustains the conclusion that the succession in the present case was complete when the deed took effect.

In *Matter of Pell*, 171 N. Y. 48, the testator's will gave a life estate in his property to his widow with remainders over at her death to his nephews and nieces and the issue of any deceased nephew or niece together with a share to his sister. He died in 1863. The life tenant died December 20, 1899, and at that time all the estates in remainder came into actual possession and enjoyment of the beneficiaries. The Act of March 10, 1899 (c. 76, Laws of that year) provided:

"All estates upon remainder . . . which vested prior to June 30th, 1885, but which will not come into actual possession or enjoyment of the person . . . beneficially interested therein until after the passage of this act, shall be appraised and taxed as soon as the person . . . beneficially interested therein shall be entitled to the actual possession or enjoyment thereof."

The court said (p. 55):

"This court and the Supreme Court of the United States have held in numerous cases that the transfer tax is not imposed upon property, but upon the right of succession. It, therefore, follows that where there was a complete vesting of a residuary estate before the enactment of the transfer tax statute, it cannot be reached by that form of taxation. In the case before us it is an undisputed fact that these remainders had vested in 1863, and the only contingency leading to their divesting was the death of a remainderman in the lifetime of the life tenant, in which event the children of the one so dying would be substituted. If these estates in remainder were vested prior to the enactment of the Transfer Tax Act there could be in no legal sense a transfer of the property at the time of possession and enjoyment. This being so, to impose a tax based on the succession would be to diminish the value of these vested estates, to impair the obligation of a contract and take private property for public use without compensation."

Matter of Craig, 97 App. Div. 289 (affirmed 181 N. Y. 551) involved a similar state of facts. The court said (p. 296):

"The underlying principle which supports the tax is that such right [the right of succession] is not a natural one but is in fact a privilege only, and that the authority conferring the privilege may impose conditions upon its exercise. But when the privilege has ripened into a right it is too late to impose conditions of the character in question, and when the right is conferred by a lawfully executed grant or contract it is property and not a privilege, and as such is protected from legislative encroachment by constitutional guaranties".

In *Hunt* v. *Wicht*, 174 Cal. 205, the court held that a deed delivered by grantor to a third person in escrow to be delivered to grantee on the death of the grantor passed a present title to the grantee, the grantor retaining only a life estate; and that the legislature was without power subsequently to impose a succession tax accruing at the termination of the grantor's life estate, simply

because the grantee was during the intervening life estate without immediate possession of the property conveyed. The court said (p. 209): "It is the vesting in interest that constitutes the succession, and the question of liability to such a tax must be determined by the law in force at that time. . . . What we have said appears perfectly clear on principle, and is sustained by practically all of the authorities in other states where the question has arisen."

In *Lacey v. State Treasurer*, 152 Iowa 477, a contract created a vested interest in real estate subject only to postponement of the right of possession and enjoyment until the death of the grantor. The court held that there was a transfer of a present interest and that its character was not affected by a condition therein, that might subsequently reduce the share of each grantee. It was also held (pp. 483-484):

> "Even though the remainder is so far conditional that it may have to be opened up to let in afterborn children, and, on the other hand, may be divested by death without issue of the person named, nevertheless it constitutes a vested interest, not subject to a subsequent collateral inheritance tax statute, passed before the termination of the life estate. In re Seaman, 147 N. Y. 69. Any attempted legislation imposing a collateral inheritance tax upon interests in remainder, which have become vested by the taking effect of the will creating them, would be unconstitutional. In re Pell, 171 N. Y. 48."

In *Houston's Estate*, 276 Pa. 330, a deed irrevocably conveyed property in trust to pay income to the settlor for life and at her death to a remainderman. The statute then in force imposed a five per cent. tax on transfers intended to take effect in possession or enjoyment at or after death. The life tenant died after the taking effect of legislation which increased the rate to ten per cent. The court held the estate passing to the remainderman taxable at five per cent. and not at the higher rate fixed by the later statute. The opinion of the Orphans' Court, adopted by the Supreme Court, said (p. 331):

> "Nor can it be successfully argued that the tax is not on the transfer of title to the property, but on the transfer of enjoyment, for, as it seems to us, the act means by this the right of enjoyment, and this was vested under the deed. If the tax is imposed when enjoyment is perfected by actual possession, and this theory is carried to its logical conclusion,

it would seem that if, during the administration of an estate, delays occur, as they necessarily must, and if, before actual distribution is made, the rate of taxation is changed, a legacy would be taxed at the changed rate, which would appear to be a *reductio ad absurdum*."

In *State ex rel.* v. *Probate Court*, 102 Minn. 268, an owner of much property organized a corporation and, his wife joining, conveyed practically all to the corporation. It issued its shares to him and he gave one-third to her. Then they transferred the stock to their four children who leased two-thirds to the father for his life and one-third to the mother for her life. The father died in 1905 after the taking effect of an inheritance tax law enacted in that year. The court held that the leases vested in each parent a life estate in the stock and reserved to the children estates in reversion which were beyond the control of the life tenants; and that the interests of the children vested when the leases were made, came into possession upon the termination of the life estates and that the inheritance tax could not be collected thereon. See also *Commonwealth* v. *Wellford*, 114 Va. 372.

We conclude that the succession was complete when the trust deeds of Mr. and Mrs. Coolidge took effect and that the enforcement of the statute imposing the excise in question would be repugnant to the contract clause of the Constitution and the due process clause of the Fourteenth Amendment. We need not consider whether it would also conflict with the equal protection clause.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

Nos. 33 and 34.—October Term, 1930.

Harold J. Coolidge and Augustus P. Loring, Trustees, Appellants, *vs.* Henry F. Long, Commissioner, etc.	Appeals from Probate Court of Norfolk County, State of Massachusetts.

[February 24, 1931.]

Mr. Justice Roberts, dissenting.

The Supreme Judicial Court of Massachusetts has construed and applied the statute as one taxing the taking of possession of property by a remainderman whose interest, acquired before the death of the donor, vested in possession and enjoyment, and free of a contingent gift over, on the donor's death. That court said:

"The . . . statute . . . is designed to include within its sweep all methods of succession to property to take effect in possession or enjoyment after the death of the grantor or donor. . . . Whenever property is conveyed upon such limitation that it will vest in interest, possession or enjoyment by reason of the death of the grantor or donor, such succession falls within the descriptive words of the statute.

"The succession to any of these attributes of property occurring as the result of the death of the grantor or donor constitutes the taxable commodity."

And also said:

"The 'tax authorized by these statutes is a tax upon 'succession', which includes the 'privileges enjoyed by the beneficiary of succeeding to the possession and enjoyment of property'. . . . .

"The present tax is not laid on the donor, but on the beneficiary; the gift taxed is not one long since completed, but one which never passed to the beneficiaries beyond recall until the death of the donor. . . . So long as the privilege of succession has not been fully exercised it may be reached by the tax." . . .

We are bound by the state court's determination as to the meaning of the statute, *Nickel* v. *Cole*, 256 U. S. 222; *Saltonstall* v. *Saltonstall*, 276 U. S. 260; and its application, *Stebbins* v. *Riley*,

268 U. S. 117, *Cohen v. Brewster*, 203 U. S. 543, *Saltonstall v. Saltonstall*, *supra*.

The application of the statute, thus defined, is held by this Court to be a denial of due process, and an impairment of the obligation of a contract, on the sole ground that the remainder vested before the adoption of the taxing statute, although the enjoyment in possession of the property, and the termination of the possibility of the contingent gift over, both followed its enactment.

This is to deny to the Commonwealth the power to distinguish, in laying its tax, between the vesting of a defeasible future interest which carries to the beneficiary no assurance of future possession or enjoyment, and the later vesting of that interest by death in possession and enjoyment of the taxable property without power

The importance of the question is shown by the fact that forty-one states and territories have statutes containing provisions substantially similar to those of the Massachusetts acts involved in this appeal. Alaska, c. 60, S. L. 1919. Arizona, c. 26, 28, S. L. 1921. Arkansas, Act 148, p. 326, Laws 1929. California, c. 821, Laws 1921, § 2; c. 844, Laws 1929, § 7. Colorado, c. 144, S. L. 1921, § 2; c. 314, S. L. 1927, § 2. Connecticut, c. 190, P. A. 1923, § 1; c. 209, P. A. 1929, § 2, 3. Delaware, c. 6, R. C. 1917, 29 Del. Laws, c. 7, Laws 1917, 36 Del. Laws, c. 7, Laws 1929. Hawaii, c. 96, Rev. Laws 1925, § 1333. Act 223, S. L. 1917. Act 142, S. L. 1921. Idaho, c. 148, Comp. Stat. 1919, § 3171; c. 241, S. L. 1929. Illinois, Laws 1909, p. 311, Smith-Hurd Stat. 1929, c. 120, § 379, p. 2436. Indiana, c. 87, Acts 1919, p. 196. Iowa, c. 351, § 7307, Code 1927. Kansas, c. 79, Art. 15, R. S. 1923. Kentucky, Art. XIX, § 4, Sta. Const. Ky. Stat. 1930. Maine, c. 266, Laws 1917, c. 147, Laws 1919. Michigan, Act No. 248, Laws 1899. Act No. 280, P. A. 1925. Minnesota, § 2292 *et seq.* 1927, Mihn. Stat. Mason, Vol. 1. Mississippi, c. 134, G. L. 1924, § 7. Missouri, Art. XXI, § 558 *et seq.*, R. S. 1919. Montana, c. 27, § 1077-1, C. C. P. 1927. Nebraska, Art. 22, c. 77, § 2201, Comp. Stat. 1929. New Hampshire, c. 71, P. L. 1923. New Jersey, c. 228, Laws 1909, c. 144, Laws 1919. New York, c. 61, § 249-n, Cons. L. 1910. North Carolina, c. 127, P. L. 1923, c. 80, P. L. 1927. North Dakota, c. 267, Laws 1927. Ohio, § 5331, Gen. Code. Oklahoma, c. 64, Art. XVIII, § 2816, Comp. Stat. 1921. Oregon, c. VI, § 10-601, Ann. Code 1930. Pennsylvania, Act May 6, 1887, P. L. 79; Act June 20, 1919, P. L. 521. Rhode Island, c. 1339, P. L. 1918, c. 2311, P. L. 1923, c. 1355, P. L. 1929. South Carolina, Acts 1922, p. 890, Acts 1925, p. 291. South Dakota, c. 11, § 6827, Comp. L. 1929. Tennessee, c. 66, P. A. 1919, c. 64, P. A. 1925. Texas, c. 5, Art. 7117, 1928 Stat. Utah, § 3143 Comp. L. 1917, c. 64, Laws 1919. Virginia, § 44 Code Appl. 1924, c. 47, Acts 1928, p. 35, Tax Code, c. 9, § 98. Washington, § 7031, Pierce 1929 Code. West Virginia, c. 33 Barnes Code 1923, c. 57, Acts 1929. Wisconsin, c. 72, Stat. 1923, c. 237, Stat. 1925. Wyoming, c. 78, S. L. 1925.

bility of being divested. It is to assert that the succession is so complete upon the mere creation of the future interest that the state must tax the future estate when that interest comes into being or thereafter abstain entirely from taxing it.

This position seems to me untenable. It is founded on the premise that the only privilege enjoyed by the holder of a future interest in property is the dry legal abstraction of owning that particular interest; that if it vested years ago, to tax the owner later on the occasion of his coming into actual possession, control and enjoyment of the property is in fact to tax him presently for the exercise of a privilege long since enjoyed.

In weighing the arguments it is essential that the nature of the challenged tax be kept clearly in mind.

Estates and the bequest of the privilege of transmitting property rights at death, and those based on the correlative privilege of acquiring the same rights are distinct. The phrases "transfer", "estate" and "succession" taxes and "death duties" are sometimes indiscriminately used to designate the two wholly different kinds of tax. It will tend to clarity to employ the more usual phraseology and refer hereafter to the excise on the privilege of transmission as a transfer tax, and that on the privilege of receipt as a succession tax.

Nobody has the natural right either to own property or to transfer it to others at his death, but derives the power so to do wholly from the state. The sovereign may tax the owner for the privilege of transmission conferred by law. *United States* v *Perkins*, 163 U. S. 625, 628. The right to receive and enjoy that which was formerly owned by another is similarly derived, and upon like principles the sovereign may tax the taker for the privilege accorded. *Magoun* v *Illinois Trust & Savings Bank*, 170 U. S. 283, 293; *Plummer* v *Coler*, 178 U. S. 115, 120-122. So distinct are these privileges that either or both may be taxed as respects the same property. *Stebbins* v *Riley*, *supra*; *Saltonstall* v *Saltonstall*, *supra*.

The one is collected on the transfer of his estate by a decedent; it taxes not that to which some person succeeds upon a death, but

Both transfer and succession taxes have been imposed by the United States, the former by the existing estate tax law, the latter by the Act of 1864 (Ch. 173, §§ 124, 127; 13 Stat. 285, 287) and the Act of 1898 (Ch. 448, § 29; 30 Stat. 464).

that which ceased by reason of death. *Nichols* v. *Coolidge*, 274 U. S. 531, 537; *Edwards* v. *Slocum*, 264 U. S. 61, 62. The other is laid on the right to become beneficially entitled to property on the death of its former owner. *Keeney* v. *New York*, 222 U. S. 525, 533; *Nichols* v. *Coolidge*, 274 U. S. at p. 541.

The latter type of excise has existed in Massachusetts for years, and the courts of that Commonwealth have consistently construed the statutes as they did in this case.[3]

Though the settlor's children took a vested interest by the delivery of the deed of trust in 1907, it was subject to be divested, as to any child, by his death prior to that of the survivor of the settlors. Until the parents died it could not be known whether a child ever would possess or enjoy the trust property. Until then he had none of the rights of an owner in fee. He could not obtain possession; that was in the trustees. He could neither spend the income nor direct its expenditure: the provisions of the deed of trust governed these matters.

In 1917 the parents conveyed their life estates to the children. The latter, conceiving that this entitled them, as sole owners, to the possession and enjoyment of the property, demanded of the trustees delivery of the corpus. This was refused. The settlors then filed a bill to reform the trust instrument so that it should provide that by surrender of the parents' life interests to the children the trust should terminate. They alleged that it was the true intent of the parties that the contingent remainders in the next of kin of the children should not vest if the interest of the settlors was released previous to the death of the survivor, and that appropriate language to express this intent had by mistake been omitted from the deed. The court held that no case had been made for the reformation of the deed, and refused relief. The trust property remained in the control and under the administration of the trustees. *Coolidge* v. *Loring*, 235 Mass. 220.

The appellants, nevertheless, assert that while the children may have required the State's aid at the time of the delivery of the deed of trust, they never again had occasion to rely on the State's assist-

[3]St. 1891, c. 425. St. 1907, c. 563. *Minot* v. *Winthrop*, 162 Mass. 113. *Callahan* v. *Woodbridge*, 171 Mass. 595. *Crocker* v. *Shaw*, 174 Mass. 266. *Attorney General* v. *Stone*, 209 Mass. 186. *Magee* v. *Commissioner of Corporations*, 256 Mass. 512.

ance; that the transfer to and into the beneficiaries was then complete; that they needed to do nothing more to become possessed of and enjoy their property; that merely to sit still and await the deaths of their parents did not constitute the doing of anything; that the vesting of their remainder interests in 1907 covers and includes its consequence, namely, their acquirement of tangible property and the enjoyment thereof at their parents' death. In short, appellants insist that the beneficiaries did not have to look to the laws of Massachusetts for the right of possession or enjoyment; and that consequently an alleged taxing of the succession on the occasion of their acquiring such possession and enjoyment is but a thinly veiled attempt retroactively to tax the acquisition of an interest which vested in 1907.

But it is obvious that the children did rely on the law of Massachusetts for their right to receive the trust property from the trustees; and it might well have been they would have had to resort to her courts to obtain possession. All the law applicable to the administration of trusts, regulating the acts of trustees, giving remedies for trustees' defaults, providing for their compensation, and requiring the full execution of their fiduciary duties, was available to appellants. Without it their future interest, by way of remainder, might have been the merest shadow.

In spite of this, it is said that the succession is one and entire; that it must be taxed at its inception or not at all; that it is wholly out of the ordinary to tax it on the occasion of its fruition in possession; and that this court has held the attempt so to do violative of the Constitution. The converse of these propositions is true. This Court has repeatedly approved the selection of the event of possession and enjoyment as the proper occasion for the imposition of an excise; and every applicable decision of the Court sustains the validity of the tax and supports the judgment of the Supreme Judicial Court of Massachusetts.

First. In laying succession taxes the United States has chosen as the occasion therefor not the acquirement of a mere technical legal interest in property, but the coming into actual possession and enjoyment; and this fact has been recognized by this Court.

By the act of June 30, 1864, § 124, a tax was imposed on legacies and distributive shares arising from personal property ". . .

passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws . . . or any personal property or interest therein, transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor" . . .

Section 127 provided that "every past or future disposition of real estate by will, deed, or laws of descent, by reason whereof any person shall become beneficially entitled, in possession or expectancy, to any real estate, or the income thereof, upon the death of any person dying after the passage of this act", should constitute the person so taking a successor and make him liable to a tax.

In *Clapp* v. *Mason*, 94 U. S. 589, a testator, who died in 1867, devised real estate to his widow for life, with remainder to her children. She died in 1872, and the children's interests then took effect in enjoyment. The tax was assessed in 1873. It was paid under protest because the act of June 30, 1864, had been repealed by act of July 14, 1870, on all legacies and successions after August 1, 1870. In an action against the collector to recover the amount paid, he defended on the ground that the tax accrued on creation of the remainder in 1867. The devisees in remainder contended that it did not accrue until they came into possession, which was subsequent to the repeal of the taxing act. This Court held that the occasion of the tax was not the vesting of the remainder, but the coming into possession by the successor. The corollary seems clear enough that if a remainderman had died during the life estate the statute would not have justified a tax upon him measured by the clear value of the property in which he owned only a future interest.

The case was followed in *Mason* v. *Sargent*, 104 U. S. 689, which involved a trust of personal property created by the same will. Testator's daughter was entitled to the income of the trust for life, and on her death the principal was to be paid to her children. It was held that no tax was due until the termination of the life trust, for until then the children had neither possession nor enjoyment.[4]

[4]See, also, *United States* v. *Hazard*, 8 Fed. 380; *United States* v. *Rankin*, 8 Fed. 872.

By act of June 13, 1898, c. 448, § 29 (30 Stat. 448, 464) an excise was imposed relating first to legacies or distributive shares passing by death and arising from personal property, and secondly to any personal property or interest therein transferred by deed, grant, bargain, sale or gift to take effect in possession or enjoyment after the death of the grantor or bargainor, in favor of any person or persons, in trust or otherwise. In *Vanderbilt* v. *Eidman,* 196 U. S. 480, 492, this Court said:

"As to this second class, the statute specifically makes the liability for taxation depend, not upon the mere vesting in a technical sense of title to the gift, but upon the actual possession or enjoyment thereof. By any fair construction the limitation expressed as to one class must be applied to the other, unless it be found that the statute, whilst treating the two as one and the same for the purpose of the imposition of the death duty, has yet subjected them to different rules."

After analyzing the words of the statute in order to arrive at its intent, the court said:

"In view of the express provisions of the statute as to possession or enjoyment and beneficial interest and clear value, and of the absence of any express language exhibiting an intention to tax a mere technically vested interest in a case where the right to possession or enjoyment was subordinated to an uncertain contingency, it would, we think, be doing violence to the statute to construe it as taxing such an interest before the period when possession or enjoyment had attached."

While there was no question of retroactivity in that case, for the reason that the statute antedated the creation of the trust, there was an attempt to tax vested interests subject to be divested prior to the time when it could be ascertained whether they would ever take effect in actual possession or enjoyment, and this the Court held could not be done in view of the language of the statute.[5]

In *Hertz* v. *Woodman,* 218 U. S. 205, *Vanderbilt* v. *Eidman* was followed. There a repealing act had been passed between the time of a decedent's death and the time for payment of a legacy under his will in accordance with the rules of administration. The Court held that as the legatee had become fully entitled to possession prior to the passage of the repealer he was liable for the tax. The dissenting justices, while not differing from the

[5]See, also, *Brown* v. *Kinney,* 137 Fed. 1018; *Ward* v. *Sage,* 185 Fed. 7; *Rosenfeld* v. *Scott,* 245 Fed. 646.

majority in the view that the tax was laid upon the coming into beneficial enjoyment and possession, were of opinion that until actual payment of the legacy the tax was not due, and therefore the repealing act had abolished it prior to the time fixed for its incidence upon the succession.

The foregoing cases are cited, not because they involve any constitutional questions, but because they answer in no uncertain terms the appellants' insistant argument that here the succession consists of but a single item,—the creation of a future interest,—and that upon the coming into being of that interest the succession is so complete as to prohibit the sovereign's imposing its excise as of the occasion of enjoyment and possession by the successor. They constitute a complete demonstration of the fallacy of the argument that a privilege tax which ignores the creation of the mere technical future interest and reaches the possession and enjoyment of property pursuant to such interest is unheard of or in any wise out of the ordinary.

Second. The sanction of this Court has been given to the collection of a like excise by the United States, under a statute similar to that here in question, and in circumstances like those in the case at bar.

A testator who died in 1846 devised real estate to his daughter for life, with remainder in fee to her son should he survive her. The daughter died in 1865. The collector's demand that the remainderman make return of his remainder for taxation under the act of 1864, above cited, was refused. The tax was assessed with penalty; payment was made under protest; and suit brought to recover the amount paid. Judgment for the collector was affirmed as to the tax, but, on grounds here immaterial, was reversed as to the penalty. *Wright* v. *Blakeslee*, 101 U. S. 174.[6]

The remainder was contingent, but it was urged that it was a form of future estate known to the law, which had vested in the son in 1846 and must be taxed, if at all, as of that date. But this court was clear that the tax was laid on the event which occurred in 1865, quoting the words of the act to show that there was a "past" "disposition of real estate by will" "by reason

[6]A similar result had been reached in like circumstances in *Blake* v. *McCartney*, 4 Clifford 101, where apparently no attack was made on the constitutionality of the tax.

whereof" the life tenant's children became "beneficially entitled, in possession" to the property devised "upon the death of (a) person dying after the passage of this act". The brief for appellant shows he argued that the phrase "past disposition" must be construed only to cover the case of a deed or will executed prior to the passage of the law, but legally operative thereafter, in order to avoid a retroactive effect of the statute and interference with vested rights. He also insisted that the construction placed upon the act by the collector brought about an arbitrary result. So little did this Court regard the argument that it does not even notice it in its opinion. The Fifth Amendment obviously applied in that case, if the Fourteenth applies in the present.

Third. In cases involving the application of state laws imposing succession taxes, in circumstances such as are here found, this Court has overruled the contentions here made, and sustained the tax. The facts involved in some of these cases were more favorable to the appellants' contentions than those in the case at bar.

In *Cahen* v. *Brewster*, 203 U. S. 543, the decedent, a resident of Louisiana, died May 26, 1904; his will was probated May 30; a final accounting was made and tableau of distribution submitted to the Probate Court on August 3. These were approved and distribution ordered by a judgment of August 16. On October 16, the universal legatees petitioned the Probate Court for the delivery of the residuary estate to them. The executors answered that a tax was due on the legacies which they were bound to withhold. On June 28, 1904, a statute had been passed which imposed a tax applicable to all successions not finally closed at the date of its passage and all that should thereafter be opened. There were no forced heirs, and under the statutes of Louisiana the universal legatees were vested by law at the moment of death with full title to the property without taking any step whatever to put themselves into possession, without demanding delivery, or signifying their assent to accept the property bequeathed. The statutes are quoted in the margin, 203 U. S. 549.

The petitioners argued that the taxing act as applied to them was violative of the Fourteenth Amendment because retroactive and arbitrary. The Supreme Court of Louisiana sustained the tax. This Court affirmed, holding that the State was at liberty to

decide at what point it would impose the tax, provided such imposition was prior to the legatees' actual possession of the property.[7]

Appellants' attempt to distinguish this case is unconvincing. They say that it merely decided that the State had the power to lay the tax so long as the property was under the control of its courts for administration. They overlook the fact that in the instant case the possession of the trustees of the Coolidge trust did not cease until the death of the survivor of the settlors. During all that time the trust property was under the control of the Massachusetts courts. Not until those trustees had settled their trust and made distribution in accordance with the law of Massachusetts could the remaindermen come into possession and enjoyment of the property. And obviously the operation of the law of Massachusetts as to credits for expenses and commissions, and as to the duties of the trustees, and as to delivery of the trust property, might all be invoked before the beneficiaries could get actual possession and enjoyment. It is certainly an immaterial difference that in the one case the fiduciaries were called executors and in the other trustees. Both were subject to the law of the state, which defined and protected the rights of beneficiaries in both cases. The Coolidge children could not obtain possession or control of the corpus despite their parents' release of all interest in it. The trustees still had duties to perform. *Coolidge* v. *Loring, supra. Cahen* v. *Brewster* presents a more extreme case than this, because it involved no such contingency of divestment as is here involved; the executors there having completed their administration, the act of physical delivery only remained to be performed by them.[8]

In *Chanler* v. *Kelsey*, 205 U. S. 466, one Astor, in 1844, 1848, 1849 and 1865, made deeds to trustees, which provided that the

[7]*Carpenter* v. *Pennsylvania*, 17 How. 456 dealt with a similar situation and the tax was sustained. It was decided prior to the adoption of the Fourteenth Amendment; but in *Orr* v. *Gilman*, 183 U. S. 278, 286, it was said that the grounds on which it went were pertinent under the amendment.

[8]In *Stauffer's Succession*, 119 La. 66, it was held that where the executors had actually delivered the property to the legatee prior to the passage of the act the tax could not be collected, because the seisin in right had merged into a seisin in fact, and that to apply the statute would be to give it a retroactive effect; and reference was made to the *Cahen* case.

income should go to his daughter Laura for life, with remainder to her issue in fee, or in default thereof, to her heirs in fee, with power of appointment amongst her issue in such amounts and proportions as she should,—by instrument in its nature testamentary, to be acknowledged by her as a deed in the presence of two witnesses, or published by her as a will,—appoint. She died in 1902 and by will exercised the power. An act of 1897 imposed a succession tax, and under its provisions the authorities sought to collect from the appointees under the daughter's will. The argument made on behalf of the beneficiaries was that the gift was completed when Astor made his deeds. It will be noted that the remainders were in that case vested, subject to be divested by the daughter's exercise of the power. The argument was strongly pressed that in the case of a power of appointment title passes under the creating instrument, and does not pass from the donee by virtue of his act of appointment. That this is sound law is undisputed. On this doctrine the beneficiaries founded their argument, that to tax the succession upon the occasion of their coming into possession and enjoyment was to tax something which had in fact occurred years before at the date of the delivery of the deeds by Astor. This is the same argument appellants now urge upon facts which present no significant legal difference from those in the *Chanler* case. The Court of Appeals of New York held the tax not offensive to any constitutional principle. This Court affirmed. In so doing, it disregarded the technical situation and looked to the substance of the matter.[9] At p. 473 it used the following language:

"However technically correct it may be to say that the estate came from the donor and not from the donee of the power, it is self-evident that it was only upon the exercise of the power that the estate in the plaintiffs in error became complete. Without the exercise of the power of appointment the estates in remainder would have gone to all in the class named in the deeds of William B. Astor. By the exercise of this power some were divested of their estates and the same were vested in others. It may be that the donee had no interest in the estate as owner, but it took her act of appointment to finally transfer the estate to some of the class and take it from others."[10]

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[9]See also, to the same effect, *Orr* v. *Gilman*, *supra*.

[10]Taxes have been sustained where a statute passed after the creation of a future interest imposed a tax on the occasion of the acquisition of possession

In *Moffitt* v. *Kelly*, 218 U. S. 400, the facts were these:

Moffitt married in California in 1863 and resided there with his wife until his death in 1906. By his will he gave his estate to his wife and children as if he had died intestate. The probate court held that his widow's interest in the marital community was within the provisions of a law passed in 1905 taxing all devolutions of property by will or intestacy. The question was, therefore, whether a surviving wife was liable for a tax, which, as applied, could only be incident to her coming into untrammeled possession and enjoyment of what she had technically owned prior to the passage of the taxing statute. The Supreme Court of California held the tax valid against her insistence that this was a violation of the contract clause, the due process clause, and the equal protection clause of the Federal Constitution. This Court sustained the judgment, and said:

"But in every conceivable aspect this proposition must rest upon one or both of two theories, either that the nature and character of the right or interest was such that the State could not tax it without violating the Constitution of the United States, or that if it could be generically taxed without violating that instrument, for some particular reason the otherwise valid state power of taxation could not be exerted without violating the Constitution of the United States. The first conception is at once disposed of by saying that it is elementary that the Constitution of the United States does not, generally speaking, control the power of the States to select and classify subjects of taxation, and hence,

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and enjoyment due to the failure to exercise a power of appointment, the exercise of which would have divested such future interest. *Saltonstall* v. *Saltonstall*, 276 U. S. 260, *infra*; *Minot* v. *Treasurer*, 207 Mass. 588; *Manning* v. *Board*, 46 R. I. 400; *Montague* v. *State*, 163 Wis. 58; *State* v. *Brooks*, (Minn.), 232 N. W. Rep. 331. Such cases are authority against appellants' contention. The "estate" or "interest" of the beneficiary is just as truly vested in such a case as here; it is equally true that he has to do nothing but wait to come into possession and enjoyment. In both instances some future event, either a voluntary act of the donor or the holder of the power, or an event certain to happen but uncertain as to the time of its happening, may deprive him of the possibility of possession and enjoyment. See *contra*, *Re Lansing*, 182 N. Y. 238; *Re Chapman*, 117 N. Y. S. 679. The courts of New York thus hold that possession and enjoyment due to the exercise of a power of appointment is taxable though the legal estate springs from the original instrument which antedated the taxing statute, while that due to non-exercise of the power is not.

even although the wife's right in the community property was a vested right which could not be impaired by subsequent legislation, it was, nevertheless, within the power of the State, without violating the Constitution of the United States, in selecting objects of taxation, to select the vesting in complete possession and enjoyment by wives of their shares in community property consequent upon the death of their husbands, and the resulting cessation of their power to control the same and enjoy the fruits thereof. And this also disposes of the second conception, since if the State had the power, so far as the Constitution of the United States was concerned, to select the vesting of such right to possession and enjoyment as a subject of taxation, clearly the mere fact that the wife had a preexisting right to the property created no exemption from taxation if the selection for taxation would be otherwise legal. It follows, therefore, that the mere statement of the contention demonstrates the mistaken conception upon which, in the nature of things, it rests.

"It is said, however, that the reasoning just stated, while it may be abstractly sound, is here inapplicable, because the thing complained of in this case is that the State of California has imposed an inheritance tax upon the share of the wife in the community and thereby taxed her as an heir of her husband, when if the laws existing at the time of the celebration of the marriage be properly construed and be held to be contractual she took her share of the property on her husband's death, not as an heir to property of which he was the owner, but by virtue of a right of ownership vested in her prior to the death of the husband, although the right to possess and enjoy such property was deferred and arose only on his death. But for the purpose of enforcing the Constitution of the United States we are not concerned with the mere designation affixed to the tax which the court below upheld, or whether the thing or subject taxed may or may not have been mistakenly brought within the state taxing law. We say so because in determining whether the imposition of the tax complained of violated the Constitution of the United States, we are solely confined to considering whether the State had the lawful power, without violating the Constitution of the United States, to levy a tax upon the subject or thing taxed. This being true, as it clearly results from what we have said that the vesting of the wife's right of possession and enjoyment arising upon the death of her husband was subject to be taxed by the State, so far as the Constitution of the United States was concerned, it follows that whether the tax imposed was designated or levied as an inheritance tax or any other is a matter with which we have no concern."

Whatever may be said of the nature of the wife's interest in community property, this decision assumes the wife's vested inter-

est in her half thereof, and that its free and unencumbered enjoyment only was postponed to the husband's death. There can be no difference in legal effect between that situation and one presented by the division of the total interests in a given property into a life tenancy and a remainder.

The authority of the cases just noted has not heretofore been questioned in this court, and for years they have stood unqualified in the vindication of the Constitutional validity of just such a tax as is now under attack.

Fourth. In all its decisions touching death duties, whether on successions or on transfers, this Court has enunciated principles which sustain the validity of the tax.

The most recent expression with respect to a succession tax concerned the very laws of Massachusetts the application of which is here called in question.

In *Saltonstall* v. *Saltonstall*, 276 U. S. 260, one Brooks, on various dates between 1905 and 1907, executed deeds to trustees, which provided that the income should be paid to the settlor for life, or, if he elected, should be accumulated, and that upon his and his wife's deaths the income should be paid to his children in spendthrift trust, with gifts over. The instruments reserved to the grantor certain powers of management of the trust and also provided that their terms might be changed by him with the concurrence of one trustee. Brooks died in 1920, having three times changed the trusts,—the last time in 1919. At the time the deeds were executed there was no statute taxing the succession to children of a decedent. But prior to Brooks' death the act of 1907, which is involved in the present case, had been passed, and had been amended by an act of 1909 taxing the acquisition of possession and enjoyment of property by virtue of the exercise of a power of appointment or by reason of the failure to exercise it. The Supreme Judicial Court of Massachusetts held that the power of revocation reserved to Brooks was equivalent to the creation of a power of appointment in him, and that since the beneficiaries could not be certain of taking until his death, the gift was one made or intended to take effect in possession or enjoyment after his death; and that the tax was on the succession, which includes the "privileges enjoyed by the beneficiary of succeeding to the possession and enjoyment of property". There as here it was claimed that the

beneficiaries had vested interests subject to be divested by a future event (in that case, the exercise of the power), which never happened, and they argued that the tax law was retroactive in its operation if applied to their interests, and hence violated the due process clause, the equal protection clause, and probably Art. I, § 10 of the Constitution. There as here it was insisted that the remaindermen needed nothing from the Commonwealth of Massachusetts subsequent to the vesting of their remainders.

After pointing out that the excise was not on the privilege of transmission, as was the Federal estate tax dealt with in *Nichols v. Coolidge*, but was upon the privilege of succession, which might Constitutionally be subjected to a tax by the State, whether occasioned by death or effected by deed, and after calling attention to the fact that the tax was imposed not on the donor, but on the beneficiary, this Court said:

"... the gift taxed is not one long since completed, but one which never passed to the beneficiaries beyond recall until the death of the donor; and the value of the gift at that operative moment, rather than at some later date, is the basis of the tax."

The court further stated that,

"So long as the privilege of succession has not been fully exercised it may be reached by the tax."

Again the court said:

"... in determining whether it has been so exercised technical distinctions between vested remainders and other interests are of little avail, for the shifting of the economic benefits and burdens of property, which is the subject of a succession tax, may even in the case of a vested remainder be restricted or suspended by other legal devices."

One of such other "legal devices" is a provision "divesting" a remainder which is "vested".

As the above quotation shows, the essential question in all such cases is whether the succession has become complete by actual possession and enjoyment, prior to the passage of the taxing act.

Notwithstanding the distinction between a transfer tax and a succession tax, the decisions under the Federal estate tax statutes (transfer tax laws) are convincing on the matter of substantiality as against technicality. The Court has uniformly disregarded the technical aspect of a transfer and looked at the reality and substance of the transaction. There is, in this aspect, no logical distinction between the two kinds of excise.

In *Chase National Bank* v. *United States*, 278 U. S. 327, where the beneficiaries' interests were admittedly vested, the Court reiterated the principle stated in *Saltonstall* v. *Saltonstall*, that the test of constitutionality is the incidence of the tax on the shifting of economic benefit, and not on the passage of mere technical legal title. Thus it said:

"Termination of the power of control at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, just as effectively as would its exercise, which latter may be subjected to a privilege tax, *Chanler* v. *Kelsey*, 205 U. S. 466."

In *Tyler* v. *United States*, 281 U. S. 497 the Court considered the estate tax provisions of the Revenue Acts of 1916 and 1921. Both acts contained a provision that upon the death of one of two tenants by the entireties there should be included in the amount of the decedent's estate, for the purpose of measuring the tax, the value of the joint estate property, "except such part thereof as may be shown to have originally belonged to" the surviving joint tenant, "and never to have belonged to the decedent". Under this provision the United States assessed a tax against the estates of Pennsylvania and Maryland decedents. Collection was resisted on the ground that, by the common law of those states, tenants by the entireties are seised of the whole and of every part of the joint estate, and that the survivor had a vested estate long prior to the passage of the acts.

It was conceded that at the death of one, nothing descends to the survivor: the latter has, in the eye of the law, no more and no less than he or she had before—technically speaking there is no succession.

But Congress expressed a purpose to tax the passage of something from the decedent at death; just as here the Massachusetts legislature showed its intent to tax the acquisition of something which accrued to the beneficiaries at the death of the settlor. In the instant case the so-called vested estate of the beneficiaries was subject to be divested by their death prior to that of the survivor of the grantors. In the *Tyler* case the estate was absolutely vested; not only so, but it was in law as large *qua* the survivor after the death of his co-tenant as it had been when both were alive; it

could not be divested by the act of either party; it could not be taken in execution of a judgment against either party; the survivor needed to make no demand upon anyone for possession.

The taxpayers argued in the *Tyler* case, on precisely the same ground as appellants now urge, that the survivor's interest had vested long prior to the adoption of the Revenue Acts; that no transfer of title or interest in property occurred on the death of one of the tenants by the entireties, and consequently the tax was arbitrary and in violation of the Fifth Amendment, because the subject or event on which the tax must be predicated was wanting. But the Court had no difficulty in holding that what happened at the death of one of the tenants was a transfer from the decedent of something which was the legitimate subject of an excise. The Court said (p. 503):

"The question here, then, is, not whether there has been, in the strict sense of that word, a 'transfer' of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights."

Language more closely descriptive of the situation presented in the present case could not be employed. Again the Court said (pp. 503-504):

"According to the amiable fiction of the common law, adhered to in Pennsylvania and Maryland, husband and wife are but one person, and the point made is, that by the death of one party to this unit no interest in property held by them as tenants by the entirety passes to the other. This view, when applied to a taxing act, seems quite unsubstantial. The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions. Whether that power has been properly exercised in the present instance must be determined by the actual results brought about by the death, rather than by a consideration of the artificial rules which delimit the title, rights and powers of tenants by the entirety at common law. See *Nicol* v. *Ames*, 173 U. S. 509, 516; *Saltonstall* v. *Saltonstall*, *supra*, p. 271.

"Taxation, as it many times has been said, is eminently practical, and a practical mind, considering results, would have some difficulty in accepting the conclusion that the death of one of the

tenants in each of these cases did not have the effect of passing to the survivor substantial rights, in respect of the property, theretofore never enjoyed by such survivor. Before the death of the husband (to take the *Tyler* case, No. 428), the wife had the right to possess and use the whole property, but so, also, had her husband; she could not dispose of the property except with her husband's concurrence; her rights were hedged about at all points by the equal rights of her husband. At his death, however, and because of it, she, for the first time, became entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will. Thus the death of one of the parties to the tenancy became the 'generating source' of important and definite accessions to the property rights of the other. These circumstances, together with the fact, the existence of which the statute requires, that no part of the property originally had belonged to the wife, are sufficient, in our opinion, to make valid the inclusion of the property in the gross estate which forms the primary base for the measurement of the tax. And in that view the resulting tax attributable to such property is plainly indirect."

Every word of the above quotation applies with as great force to the beneficiaries of the Coolidge trust as it applied in that case to the surviving tenant.

In *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, a testator who died in 1922 had, in the period between 1903 and 1919, while not in contemplation of death, executed seven trust indentures. Two of these provided that the income should be paid to the settlor for life; and after his death to named persons, with remainders over. These deeds reserved a power of revocation to the settlor alone. The remaining five provided for life incomes to certain persons, terminable five years after the settlor's death, or upon the death of the life tenants, whichever should first happen, with remainders over. Powers of amendment were reserved in these, not to the settlor alone, but jointly to the settlor and certain beneficiaries. One of the seven trusts was modified in a matter immaterial to the decision, and the others were not modified or revoked. In calculating the amount of the Federal estate tax the United States sought to include the property embraced in all seven of the trusts. It was held that as to the two trusts in which the settlor had unrestricted power of revocation

the transfer was not complete until his death. As to the five trusts in which the settlor did not have such power in himself alone, but had power of amendment jointly with beneficiaries, it was decided that the property had for all practical purposes passed completely from his control. It was pointed out that the reservation of powers of management in the settlor, as distinguished from the right to revoke or change the beneficiaries of the trust, was insignificant, and that the essential test was the passage of the economic benefit or enjoyment of the property. Thus it was said:

"Nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete. The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made. His power to recall the property and of control over it for his own benefit then ceased and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift *inter vivos* not subject to the tax."

Repeatedly throughout the opinion the passage of the control, possession and enjoyment of the property is referred to as the touchstone of the incidence of the tax. If that be the test when the privilege of the transferor is under investigation, no reason is apparent why the same yardstick should not be used when we are considering acquisition of rights by the beneficiary.

Thus the *Reinecke* case is a full authority for the disregard of mere legal interests as distinguished from substantial rights of control or enjoyment. Technically speaking, the remainders to the beneficiaries in that case were vested subject only to be divested by the exercise of a power of revocation reserved to the grantor. It has been argued in the instant case that the vested estates created by the deed of 1907 never were divested: that the event which could work a divestiture never occurred. That was equally true in the *Reinecke* case.

It might well have been argued in the *Reinecke* case that the right of revocation reserved by the grantor did not constitute an interest in the property; was not a property right, and therefore the grantor having parted with all legal interest his estate could not be taxed as upon the transfer of any property or any interest

recognized by the law. Such an argument would have been technically sound under *Jones* v. *Clifton*, 101 U. S. 225, 230, where it was said of such a power:

"The title to the land and policies passed by the deeds: a power only was reserved. That power is not an interest in the property which can be transferred to another, or sold on execution, or devised by will. . . . Nor is the power a chose in action."

The reasoning in the *Reinecke* case shows that such an argument would have been of no avail. No more ought the argument of appellants, based upon the so-called vesting of the future interest at the execution of the deed, prevail in this case.

It is said that the death of the settlors has no necessary relation to the benefits received by the remaindermen; that any other event might as well have been chosen as the occasion for the commutation of the children's future interests into interests in fee simple in possession; and that this in itself makes the tax arbitrary and unreasonable because the incident which occasions its imposition is irrelevant. This Court has negatived this contention. In *Keeney* v. *New York, supra,* it was said:

"There can be no arbitrary and unreasonable discrimination. But when there is a difference it need not be great or conspicuous in order to warrant classification. In the present instance, and so far as the Fourteenth Amendment is concerned, the State could put transfers intended to take effect at the death of the grantor in a class with transfers by descent, will or gifts in contemplation of the death of the donor, without, at the same time, taxing transfers intended to take effect on the death of some person other than the grantor, or on the happening of a certain or contingent event."

And in the same case it was said:

"Where the grantor makes a transfer of property to take effect on the death of a third person, it might . . . be taxed as a devolution or succession."[11]

[11]See also *Blake* v. *McCartney*, 4 Clifford, 101, where under a bequest in trust effective in 1847, two successive life estates were created, the second of which took effect in possession in 1867, and it was held the beneficiary was liable for tax under the act of 1864. The court said: "The argument for the plaintiff is, that the tax can only be imposed by virtue of the section in question, where the death of the predecessor is the cause of the successor's being entitled to possession of the real estate, and not where it is merely the occasion, as in this case; but the proposition finds no support in the language of the provision, and the rule in the Exchequer Court of England is well settled the other way."

And in *Chase National Bank* v. *United States, supra,* the same principle was announced at page 338.[12]

Appellants rely on *Nichols* v. *Coolidge, supra*; *Blodgett* v. *Holden*, 275 U. S. 142; *Untermyer* v. *Anderson*, 276 U. S. 440; *Chase National Bank* v. *United States, supra;* and *Reinecke* v. *Northern Trust Company, supra*, as in principle supporting their position. The *Reinecke* case and the *Chase National Bank* case have already been analysed. It is evident from what has been said that appellants can derive no comfort from those decisions.

Of course the test to be applied in cases arising under the Federal estate tax law is whether the transferor has parted with every vestige of control over the beneficial enjoyment and possession of the property, and not whether the beneficiary has received it. *Nichols* v. *Coolidge* dealt, under the Federal estate tax law, with the same trust involved in this case, and the inquiry there necessarily was whether prior to the passage of the estate tax act the grantors had so fully divested themselves of all right of control and enjoyment of the property that nothing remained to pass out of them at death. The facts were held to make an affirmative answer imperative. Here, on the other hand, we inquire, not whether the grantor has parted with title, control and enjoyment, but whether the grantee has fully acquired them prior to the passage of the law.

In *Blodgett* v. *Holden* and *Untermyer* v. *Anderson* the Court had under consideration a transfer tax laid on the donor in respect of gifts made *inter vivos*. The gifts in those cases were complete prior to the passage of the taxing statute, and, as in *Nichols* v. *Coolidge*, technical title, power to recall, and beneficial use and enjoyment had all passed from the donor prior to the legislative attempt to tax the gift. These circumstances demonstrate that neither case is an authority for holding a succession tax invalid if levied on the occasion of the acquisition of possession and enjoyment of property by the donee.

Finally, appellants cite *Matter of Pell*, 171 N. Y. 48, and certain cases in state courts which have followed it. That case adopts the views urged by appellants. It was followed in *Hunt* v. *Wicht*, 174 Cal. 205.

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[12]See *Boston Safe Dep. & T. Co.* v. *Commissioner*, (Mass.), 166 N. E. Rep. 729.

Houston's Estate, 276 Pa. 330 involved no constitutional question. The statute in that case was construed to apply only to interests thereafter created.

In *Lacey* v. *State Treasurer*, 152 Ia. 477, and *Comm.* v. *Welford*, 114 Va. 372 the statutes were construed as affecting only interests thereafter arising, though in both there were *dicta* to the effect that a contrary construction would render them unconstitutional. The *dictum* in the *Lacey* case is repugnant to the later decision in *Brown* v. *Gulliford*, 181 Ia. 897.

State v. *Probate Court*, 102 Minn. 268, is not only distinguishable on its facts, as later held by the same court (*State* v. *Brooks*, 232 N. W. 331, 334), but the constitutional question here raised was not discussed.

In a well-considered case, involving precisely the same question as *Cahen* v. *Brewster*, *supra*, the tax was sustained. *Gelsthorpe* v. *Furnell*, 20 Mont. 299.

It cannot, therefore, be said, as appellants contend, that there is any considerable body of state decisions in their favor.

The reasoning of the state court cases which have held the tax invalid is flatly contrary to the decisions of this Court in the cases above discussed; and, in view of that fact, it should not prevail here.

The Massachusetts court described the tax as one on the succession, and we have dealt with it on that basis; but it is neither necessary to sustain it nor permissible to defeat it by applying to it any particular descriptive language. See *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 625, 626; *Educational Films Corp.* v. *Ward*, No. 350, decided January 12, 1931. *Moffitt* v. *Kelly*, *supra*; *Tyler* v. *United States*, *supra*. A state's power to tax property is plenary. The power to tax it as a whole necessarily embraces the power to tax any of its incidents, or the use or enjoyment of them,—provided only that the taxable occasion does not antedate the taxing statute so as to render it invalid because retroactive. If the property itself may Constitutionally be taxed, obviously it is competent to tax the use of it, *Billings* v. *United States*, 232 U. S. 261; *Hylton* v. *United States*, 3 Dall. 171; or a sale of it, *Thomas* v. *United States*, 192 U. S. 363, 370; *Nicol* v. *Ames*, 173 U. S. 509; or the gift of it, *Bromley* v. *McCaughn*, 280 U. S. 124. And if the gift of it may be taxed, it is difficult to see upon what Constitutional grounds

the power to tax the receipt of it, whether as the result of inheritance or otherwise, may be denied to a state, whatever name may be given the tax, and even though the right to receive it, as distinguished from its actual receipt at a future date, antedated the statute. Receipt in possession and enjoyment is as much a taxable occasion as the enjoyment of any other incident of property. A levy upon the taking possession of property acquired by inheritance is one of the most ancient forms of tax known to the law. It existed on the European continent and in England prior to the adoption of our Constitution.[13]

A tax laid upon the succession after the future interest has been created and the right accrued, but before the actual enjoyment in possession of the property, is no more a denial of due process than a tax laid upon income accrued prior to the adoption of the taxing statute but received after its passage. The constitutionality of the latter form of tax is now beyond question, *Brushaber* v. *U. P. R. R.* 240 U. S. 1, 20; *Lynch* v. *Hornby*, 247 U. S. 339, 343; *Taft* v. *Bowers*, 278 U. S. 470, 483, 484; *Cooper* v. *United States*, 280 U. S. 409, 411.

The contention that taxation of a property right or an incident of ownership previously created by a deed or contract impairs the obligation of the contract is not new. But it must be denied both on reason and on authority. The present tax has no reference to the contract or its obligation save to recognize and observe the existence of both. It would serve no useful purpose at this late day to elaborate the doctrine, long since settled, that to be obnoxious to the contract clause, a statute must act upon the contract so as to interfere with the right of enforcement. All of the cases cited as supporting the conclusion of the Court deal with such a situation. None of them even remotely bears on the question here raised whether a tax levied in respect of the future enjoyment of property which chanced to be acquired under an earlier contract impairs the contract. That question, often raised, has always been answered here in the negative.

In *Orr* v. *Gilman, supra*, it was claimed that a succession tax law enacted after the original deed granting a power of appoint-

[13] *Nielson* v. *Johnson*, 279 U. S. 47, 53; Gleason and Otis, "Inheritance Taxation" (4th Ed.) 243. As shown by Digby, "History of the Law of Real Property" (5th Ed.) p. 40, feudal "relief" was a payment made by an heir for the privilege of admission as tenant of the land in his ancestor's place.

ment, and construed as taxing the beneficiary of the power, violated Art. I, § 10 of the Constitution. The argument was rejected.

A similar contention made in *Chanler* v. *Kelsey*, *supra*, was disposed of in these words:

"Nor do we perceive that the effect has been to violate any contract right of the parties. It is said that this is so, because instead of disposing of the entire estate, ninety-five per cent of the property included in the power has been transferred and five per cent taken by the State; but as there was a valid exercise of the taxing power of the State, we think the imposition of such a tax violated no contract because it resulted in the reduction of the estate."

Justice White, in *Moffitt* v. *Kelly*, *supra*, said of a similar contention:

"1. *The alleged violation of the contract clause.*—Considered merely subjectively, the contention is that the rights vested in the wife as a partner in the community existing by virtue of the constitution and laws of the State of California governing at the time of the marriage were contractual rights of such a character that they could not be essentially changed or modified by subsequent legislation without impairing the obligations of the contract, and thereby violating the Constitution of the United States. But even although this theoretical proposition be fully conceded, for the sake of the argument, it is apparent that it is here a mere abstraction, and is therefore irrelevant to the case to be decided. We say this because there is no assertion of the giving effect to any law enacted subsequent to the contracting of the marriage which purports to essentially modify the rights of the wife in and to the community, as those rights existed at the time the marriage was celebrated. This is so because the state law, the enforcement of which it is asserted will impair the obligation of the contract, is merely a law imposing a tax." (218 U. S., pp. 402-403).

The foregoing cases constitute only one application of a principle which has been repeatedly applied not only to rights derived under deeds in their aspect as contracts, but to rights derived pursuant to all sorts of contracts. It was said in *North Missouri Railroad* v. *Maguire*, 20 Wall. 46, 61:

"Authorities from numerous sources are cited by the plaintiffs, but none of them show that a lawful tax on a new subject, or an increased tax on an old one, interferes with a contract or impairs its obligation, within the meaning of the Constitution, even though such taxation may affect particular contracts, as it may increase the debt of one person and lessen the security of another, or may

impose additional burdens upon one class and release the burdens of another, still the tax must be paid unless prohibited by the Constitution, nor can it be said that it impairs the obligation of any existing contract in its true legal sense."

With respect to deeds and grants, this Court said in *Providence Bank* v. *Billings*, 4 Pet. 514, 562:

"Land, for example, has, in many, perhaps in all the states, been granted by government since the adoption of the constitution. This grant is a contract, the object of which is that the profits issuing from it shall enure to the benefit of the grantee. Yet the power of taxation may be carried so far as to absorb these profits. Does this impair the obligation of the contract? The idea is rejected by all; and the proposition appears so extravagant, that it is difficult to admit any resemblance in the cases."

In *Kehrer* v. *Stewart*, 197 U. S. 60, it was contended that a statute levying a tax upon all agents of packing houses doing business in the state, of $200, in each county where such business was carried on, impaired the obligation of the contract which an agent had entered into with a packing house. With respect to this contention this Court said:

"The argument that the tax impairs the obligation of a contract between the petitioner and Nelson Morris & Company is hardly worthy of serious consideration. The power of taxation overrides any agreement of an employé to serve for a specific sum."

With respect to a tax upon income, it was said in *Murray* v. *Charleston*, 96 U. S. 432, 446:

"A tax on income derived from contracts, if it does not prevent the receipt of the income, cannot be said to vary or lessen the debtor's obligation imposed by the contracts."

In *Clement National Bank* v. *Vermont*, 231 U. S. 120, the claim was that a state statute which levied a tax on bank deposits collectible from the depositor, and which had to be deducted by the bank from the interest paid to the depositor, impaired the obligations of the prior contracts of depositors with the bank. This Court overruled the objection, saying:

"But this is clearly untenable. The statute did not act upon such contracts; it imposed a tax upon the property of depositors in the exercise of a power subject to which the deposits were made."

In *Lake Superior Mines* v. *Lord*, 271 U. S. 577, the obligation of an outstanding contract for the receipt of royalties on minerals

mined was held not to be impaired by a later state statute taxing the proceeds of the contract. The Court said:

"Titles to all the lands and leases were obtained subject to the State's power to tax. If the statute now in controversy is within that power, it cannot impair the obligation of appellants' contracts; if beyond, it is, of course, invalid. Accordingly, there is no occasion further to discuss the application of Article I, Section 10."

In short, it is evident from the authorities cited, and many more which might be quoted, that the power to tax property, or a right, or a status, or a privilege, acquired or enjoyed by virtue of a contract, is no wise hindered or impeded by the fact of the existence of the contract whether it antedates or follows the effective date of the taxing act. No exercise of a governmental power, whether it be that of taxation, police, or eminent domain, though it make less valuable the fruits of a private contract, can be said to impair the obligation thereof.

I think the judgment should be affirmed.

Mr. Justice HOLMES, Mr. Justice BRANDEIS and Mr. Justice STONE concur in this opinion.